DOCKET

(g)

No. 96-1400-CFX
Status: GRANTED

Title: California and State Lands Commission, Petitioners
v.
Deep Sea Research, Inc., et al.

Docketed:
March 5, 1997

Court: United States Court of Appeals for
the Ninth Circuit

Counsel for petitioner: Rusconi,Joseph C.

Counsel for respondent: Alford,Fletcher C., Solicitor
General

Ptn due & mld 3-4-97, see ml label re dkt dt.

Entry	Date	Note	Proceedings and Orders
1	Mar 4 1997	G	Petition for writ of certiorari filed. (Response due May 5, 1997)
3	Mar 31 1997		Order extending time to file response to petition until May 5, 1997.
5	Apr 4 1997	G	Motion of National Trust for Historic Preservation, et al. for leave to file a brief as amici curiae filed.
6	Apr 4 1997		Brief amici curiae of Florida, et al. filed.
7	May 5 1997		Waiver of right of respondent United States to respond filed.
8	May 5 1997		Brief of respondent Deep Sea Research in opposition filed.
9	May 5 1997	G	Motion of Columbus-America Discovery Group for leave to file a brief as amicus curiae filed.
10	May 15 1997		Reply brief of petitioners California, et al. filed.
11	May 20 1997		DISTRIBUTED. June 5, 1997 (Page 1)
13	Jun 9 1997		Motion of National Trust for Historic Preservation, et al. for leave to file a brief as amici curiae GRANTED.
14	Jun 9 1997		Motion of Columbus-America Discovery Group for leave to file a brief as amicus curiae GRANTED.
15	Jun 9 1997		Petition GRANTED. SET FOR ARGUMENT December 1, 1997. **********
16	Jun 23 1997	D	Application (A96-925) stay of district court order pending sending down of judgment of this Court, submitted to Justice O'Connor.
17	Jun 26 1997		(A96-925) Opposition thereto filed.
20	Jun 27 1997		Application (A96-925) referred to the Court by Justice O'Connor.
19	Jun 30 1997		(A96-925) Reply by California filed
23	Jul 2 1997		Order extending time to file brief of petitioner on the merits until August 15, 1997.
21	Jul 3 1997		Application (A96-925) denied by the Court.
24	Jul 24 1997		Joint appendix filed.
25	Jul 24 1997		*Joint appendix in two volumes
26	Aug 15 1997		Brief of petitioners State of California, State Lands Commission filed.
28	Aug 15 1997		Brief amici curiae of Florida, et al. filed.
29	Aug 15 1997		Brief amici curiae of National Trust for Historic Preservation, et al. filed.
30	Aug 15 1997		Brief amici curiae of Council of State Governments, et al.

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No. 96-1400-CFX

Entry	Date	Note	Proceedings and Orders
			filed.
27	Aug 20 1997		Brief of respondent United States in support of petition filed.
32	Aug 26 1997		Order extending time to file brief of respondent on the merits until September 30, 1997.
33	Sep 15 1997		Brief amici curiae of Atlantic Mutual Insurance Company, et al. filed.
34	Sep 30 1997		Brief of respondent Deep Sea Research, Inc. filed.
35	Sep 30 1997		Brief amicus curiae of American Institute of Marine Underwriters filed.
36	Sep 30 1997		Brief amici curiae of Salvors, Inc., et al. filed.
37	Sep 30 1997		Brief amici curiae of Columbus-America Discovery Group, et al. filed.
38	Oct 16 1997	G	Motion of the Acting Solicitor General for divided argument filed.
39	Oct 17 1997		Opposition of petitioner to motion of the Acting Solicitor General for divided argument filed.
40	Oct 17 1997	D	Motion of Columbus-America Discovery Group, et al. for leave to participate in oral argument as amici curiae filed.
41	Oct 24 1997		CIRCULATED.
42	Oct 27 1997		Opposition of respondent to motion of the Acting Solicitor General for divided argument filed.
45	Oct 31 1997	P	Application (A97-332) to extend the time to file a petition for a rehearing from October 31, 1997 to November 3, 1997, submitted to Justice O'Connor.
43	Nov 3 1997		Motion of the Acting Solicitor General for divided argument GRANTED. and the time for oral argument is allotted as follows: petitioners - 25 minutes; respondent Deep Sea Reserach, Inc. - 25 minutes; and the Acting Solicitor General - 10 minutes.
44	Nov 3 1997		Motion of Columbus-America Discovery Group, et al. for leave to participate in oral argument as amici curiae DENIED.
46	Nov 3 1997		(A97-332) Application granted by Justice O'Connor extending the time to file until November 3, 1997.
47	Nov 3 1997	X	Reply brief of petitioners California, et al. filed.
48	Nov 3 1997	X	Reply brief of respondent United States as respondent supporting petitioners filed.
49	Nov 4 1997		Letter from counsel for amicus Columbus America, et al. received and distributed.
50	Nov 19 1997		Record filed.
		*	Record proceedings U.S. Court of Appeals for the Ninth Circuit (1 volume).
52	Nov 26 1997		Record filed.
		*	Record proceedings U.S. District Court, Northern District California (1 box).
51	Dec 1 1997		ARGUED.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

961400 MAR 4 1997

OFFICE OF THE CLERK

No.

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

STATE OF CALIFORNIA,
STATE LANDS COMMISSION,
Petitioners,

v.

DEEP SEA RESEARCH, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in an *in rem* admiralty action seeking title or salvage rights to a shipwreck lying on the submerged lands of a State, a State's successful invocation of Eleventh Amendment immunity is dependent upon whether the State can first prove to the district court by a preponderance of the evidence that it owns the shipwreck.

2. Whether the Abandoned Shipwreck Act, 43 U.S.C. §§ 2101–2106, "preempts" State title to shipwrecks that are not within the coverage of the Act.

3. Whether an historic shipwreck should be considered not "abandoned," and thus not subject to the protections of the Abandoned Shipwreck Act, solely because an insurance company paid a claim on a portion of the ship's cargo.

PARTIES BELOW

The parties below in addition to those named in the caption were the United States of America and the *Brother Jonathan*, her appurtenances, furniture, tackle, cargo, etc.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

STATE OF CALIFORNIA,
STATE LANDS COMMISSION,
Petitioners,

v.

DEEP SEA RESEARCH, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The State of California and the State Lands Commission respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, as amended on denial of rehearing, Pet.App. A1–A19, is reported at 102 F.3d 379. The opinion of the district court, Pet.App. A20–A58, is reported at 883 F. Supp. 1343.

JURISDICTION

The court of appeals filed its initial opinion on July 17, 1996 (89 F.3d 680). The court of appeals denied rehearing and filed its amended opinion on December 4, 1996. Pet.App. A1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

1. The Eleventh Amendment to the United States Constitution, which provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

2. The Abandoned Shipwreck Act of 1987, 102 Stat. 432, 43 U.S.C. §§ 2101–2106, which is set forth in Appendix F to the petition. Pet.App. A64–A68.

3. The Submerged Lands Act, 67 Stat. 29, 43 U.S.C. §§ 1301–1315, relevant portions of which are set forth in Appendix G to the petition. Pet.App. A69–A71.

4. Chapter 732 of California Statutes of 1989, which, *inter alia*, adopts sections 6309, 6313, and 6314 of the California Public Resources Code. Relevant portions of chapter 732 are set forth in Appendix H to the petition. Pet.App. A72–A78.

5. The definition of "abandoned shipwreck" in the Secretary of the Interior's Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50120–21 (1990), relevant portions of which are set forth in Appendix I to the petition. Pet.App. A79.

STATEMENT

The *Brother Jonathan* was a 220-foot long, wooden-hulled, double side-wheeled paddle steamer, powered both by sails and a single-cylinder steam engine. Built in 1850 at the height of the California Gold Rush, it bridged the ages of sail and steam in navigation. On Friday, July 28, 1865, the *Brother Jonathan* left San Francisco bound for Puget Sound. On board were approximately 250 passengers and crew. On Sunday, July 30, 1865, after leaving Crescent City, California, where it had offloaded cargo, the ship encountered a violent storm and heavy seas. While attempting to return to

Crescent City in the storm, it struck a submerged rock. The *Brother Jonathan* went down in 250 feet of water approximately four and one-half miles from shore. Of those on board, all but 19 drowned. Among those lost were Anson Henry, Governor of Washington Territory; General George Wright, commander of the Northern District of the Army; and James Nesbit, editor of the San Francisco Bulletin newspaper, whose body later washed ashore with a farewell letter to his wife and children. It was one of the worst maritime disasters in California history. In recognition of its historical significance, the *Brother Jonathan* has been determined eligible for listing in the National Register of Historic Places.

One hundred twenty-three years later, in 1988, the president of Deep Sea Research, Inc., Donald Knight, applied to the California State Lands Commission for a permit to salvage the *Brother Jonathan*. Knight's company, which was then called Sea Epics, Inc., later decided, however, not to pursue the application.

Thereafter, on November 1, 1991, respondent Deep Sea Research, Inc. ("DSR") brought an *in rem* action on the admiralty side of federal district court seeking title or salvage rights to the wreck of the *Brother Jonathan*. Summons was issued, and a copy of the summons and complaint mailed to the State Lands Commission, with proof of service by mail attached. In response to an inquiry from the State's counsel, counsel for DSR explained that the mailing was intended to give "notice" of the pending action to the State, but not to effect service.

The State of California and the State Lands Commission (hereinafter sometimes jointly referred to as "the State" or "California") then intervened in the action for the limited purpose of asserting the State's Eleventh Amendment immunity. The United States also intervened to support the constitutionality of the Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101–2106 ("ASA"), which had been challenged by DSR. Upon DSR's initiative, however, the action was dismissed without prejudice on June 19, 1992.

In February 1994, DSR reopened the case. California

promptly filed a motion to dismiss the action, invoking its sovereign immunity from suit under the Eleventh Amendment to the United States Constitution. DSR moved for a warrant for the arrest of the vessel, and for its appointment as the exclusive salvor.

In support of its motion, the State cited two claims to ownership of the shipwreck. It claimed first under the provisions of the ASA. The ASA expressly transfers to the States title to abandoned historic shipwrecks that are either (1) embedded in a State's submerged lands, or (2) resting on a State's submerged lands and included in, or determined eligible for inclusion in, the National Register of Historic Places ("National Register"). 43 U.S.C. § 2105(a), (c). The ASA further provides for development of shipwreck management programs by the States pursuant to federal guidelines, *id.* at § 2104, and removes such shipwrecks from the admiralty jurisdiction of the federal courts, *id.* at § 2106(a).

Second, California claimed title under the provisions of the Submerged Lands Act, 43 U.S.C. § 1301–1315, and California Public Resources Code section 6313. The Submerged Lands Act grants California title to a three-mile band of submerged lands along the open coast. Section 6313 asserts title to all abandoned shipwrecks and all archaeological sites and historical resources on or in California's tide and submerged lands.[1] The parties subsequently stipulated that the

1. Section 6313, along with sections 6309 and 6314 of the California Public Resources Code, is part of California's Shipwreck and Historic Maritime Resources Program, which is administered by the State Lands Commission. Cal. Stats. 1989, ch. 732, §§ 1, 3; Cal. Pub. Res. Code § 6309(a). The legislation recites:

> "California has a rich and varied maritime history. . . . This history has left California with a rich maritime legacy in underwater antiquities. The Legislature finds an urgent need to identify and protect the historic, scientific, and cultural values inherent in submerged antiquities and to preserve and maintain objects of state or national significance for the benefit and inspiration of all the people of the state.
>
> ". . . Technological innovation is making the submerged lands of the state more accessible each year and providing unprecedented opportunities to learn more about the people of past societies and civilizations who lived and traveled along the coast of our state. California has over one-half million certified divers and that number is increasing daily. The large number of divers, and the advancement in marine technology, without adequate diver education and resource protection, will jeopardize California's underwater cultural heritage. It is the intent of the Legislature that the State Lands Commission, in its role as trustee of the submerged lands of the state, administer the Shipwreck and Historic Maritime Resources Program established by this act to preserve and protect the underwater cultural resources of the state." Cal. Stats. 1989, ch. 732, § 1.

Brother Jonathan lay on State-owned submerged lands.

At the September 9, 1994 hearing on the motions, the district court stated that it could not rule on the State's motion to dismiss without further evidence on the ASA issues of vessel "abandonment," "embeddedness," and eligibility for listing in the National Register.

At a subsequent evidentiary hearing two and one-half weeks later, the State, with little time for preparation and without any discovery of DSR, presented limited evidence on the issues of "abandonment," "embeddedness," and the historical significance of the wreck. DSR also submitted to the court a videotape of the wreck lying on the ocean floor. The tape has an audio narrative that contains the statement: "Sand now buries the wreck almost all of the way to the top of the steamer's copper sheathing. This encroachment of sand and mud in effect protects the wreck." The district court admitted the tape, but excluded its voice-over audio as hearsay. DSR called no witnesses at the hearing, and the State had no opportunity to cross-examine the persons who submitted declarations on behalf of DSR.

Following the hearing, the district court denied the State's motion to dismiss. Pet.App. A20–A58, A59. It ruled that the

State had failed to establish a "colorable claim" to the *Brother Jonathan* under the ASA, having failed to carry its burden of proof "by a preponderance of the evidence" that the wreck was abandoned, embedded, or included in, or determined eligible for inclusion in, the National Register. The court also held that California Public Resources Code section 6313 was preempted by the ASA, and that the State therefore had no colorable claim under that statute either. The district court also granted DSR a warrant for the arrest of the vessel, and appointed it the exclusive salvor of the *Brother Jonathan*. Pet.App. A60, A62.

After California appealed, the United States filed a claim to a portion of the vessel's cargo. Also, during the pendency of the appeal, the *Brother Jonathan* was determined eligible for listing in the National Register, and a request for judicial notice of that fact was filed with the court of appeals.

On appeal, the Court of Appeals for the Ninth Circuit ruled that California, to successfully invoke its Eleventh Amendment immunity from suit by DSR in federal court, must establish a "colorable claim" to the *Brother Jonathan*. To do that, the State had to prove by a preponderance of the evidence the merits of its claim under the ASA. Pet.App. A9–A14. The court explained that it was appropriate for the district court to require the State to present evidence in support of its claims because "a federal court has both the power and duty to determine whether a case falls within its subject matter jurisdiction." Pet.App. A11. "Otherwise . . . the State could receive immunity simply by asserting that it was entitled to it." *Id.*[2] The court relied for this conclusion on its decision

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2. The court later supplemented its rationale with the following statement:

> "Finally, in addressing the questions of abandonment, embeddedness, and historical significance of the wreck under the ASA, a federal court does not adjudicate the state's rights. The ASA does not vest title to wrecks that satisfy its requirements directly in the state. Rather, it provides that the *federal* government may assert title to such wrecks. *See* 43 U.S.C. § 2105(a). Only after the federal government takes title to the abandoned shipwreck may title then be transferred to the state. 43 U.S.C. § 2105(c). Thus, the federal court may adjudicate the question whether a wreck meets the requirements of the ASA without implicating the Eleventh Amendment. [Footnote omitted.] Therefore, we hold that the district court did not err in requiring the State to prove by a preponderance of the evidence that it was entitled to Eleventh Amendment immunity." Pet.App. A13–A14.

in *ITSI TV Productions* v. *Agricultural Associations*, 3 F.3d 1289 (9th Cir. 1993), which had examined whether various district agricultural associations were "arms of the State" for Eleventh Amendment purposes. Quoting *ITSI*, the court stated:

> "Eleventh Amendment immunity, whatever its jurisdictional attributes, should be treated as an affirmative defense, which must be proved by the party that asserts it and would benefit from its acceptance." (Internal quotation marks omitted.) Pet.App. A12.

The court concluded this branch of its opinion with the statement:

> "We find that, according to the reasoning of the court in *ITSI TV*, the party asserting immunity has the burden to establish that it is entitled to immunity *even if the determination of that issue touches the merits of the claim.*" (Italics added.) Pet.App. A13.

Here, the court of appeals held that the State had failed to prove that the *Brother Jonathan* had been completely abandoned. It concluded that the wreck must be treated as a "unified *res*," and that a portion of the cargo had not been abandoned because an insurer had paid a claim on it. That ruling was held to preclude vesting of State title to the vessel and the remainder of the cargo under the ASA, even if the vessel itself and the remainder of the cargo had been aban-

doned. The court held that not only a vessel but all of its cargo must be abandoned before title vests in a State under the ASA. Pet.App. A14–A19.

Concerning California's independent claim under the Submerged Lands Act and the State statute, the opinion concluded in a brief paragraph that Congress had preempted this claim to ownership of the shipwreck when it provided in 43 U.S.C. § 2106(b) that: "This chapter shall not change the laws of the United States relating to shipwrecks other than those to which this chapter applies." The court premised its conclusion on its assertion that claims involving all other shipwrecks are within the "exclusive" jurisdiction of federal admiralty courts and "thus" such claims are preempted because not based on the ASA. Pet.App. A7–A9, A11. Accordingly, the court ruled that California could not establish a "colorable claim" to the *Brother Jonathan* merely by demonstrating that the wreck lay on State submerged lands and that a State statute asserted ownership of such shipwrecks. On the basis that it was a pre-ASA case, the court distinguished one of its own prior cases, *Marx* v. *Government of Guam*, 866 F.2d 294 (9th Cir. 1989), which had recognized the sufficiency of just such a colorable claim.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's opinion directly conflicts with decisions of both the Seventh Circuit and the First Circuit concerning whether, in response to a State's assertion of immunity from suit under the Eleventh Amendment, a district court may probe the basis for and the strength of the State's claim on the merits. Scarcely a month ago, the Sixth Circuit cast its lot with the Ninth Circuit on this issue, further exacerbating the conflict. The confusion among the four circuits is at least in part due to language in the plurality opinion of this Court in *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670 (1982), which has been interpreted in the Ninth Circuit, and now in the Sixth Circuit, as permitting a district court, in

responding to a State's invocation of the Eleventh Amendment, to accept or reject the immunity claim, depending upon whether the State has a "colorable claim" on the merits.

Further, the lower court's conclusion that the ASA "preempted" other statutory or decisional law bases for California's title claim to the *Brother Jonathan*, which the court incorporated into its Eleventh Amendment analysis to establish that the State did not have a colorable claim, rests on insupportable assumptions concerning the source and content of maritime law.

Finally, the lower court's restrictive interpretation of the term "abandoned" will significantly impair the ability of the States to achieve the ASA's goal of protecting, preserving, and assuring the archaeologically sound recovery of historic shipwrecks. There are an estimated 5,000 of these invaluable cultural and historic resources lying on State submerged lands throughout the country.

I. THERE IS CONFLICT AMONG THE CIRCUITS CONCERNING APPLICATION OF THE STATES' ELEVENTH AMENDMENT IMMUNITY IN ADMIRALTY SUITS BROUGHT *IN REM*

The Seventh Circuit, in *Zych* v. *Wrecked Vessel Believed to be the Lady Elgin*, 960 F.2d 665 (7th Cir. 1992), has held that the strength of a State's claim is irrelevant in determining a State's immunity from suit under the Eleventh Amendment. In that post-ASA case, the State of Illinois based its claims to a shipwreck both on the ASA and on State statutes. The court concluded: "The strength of the state's legal position is irrelevant; the eleventh amendment prevents the district judge from exercising jurisdiction." *Id.* at 670. The Ninth Circuit's decision here is in direct conflict with *Zych* because it holds that, after the enactment of the ASA, a State asserting ownership of a shipwreck on its lands, and asserting Eleventh Amendment immunity from suit in admiralty court, must show by a preponderance of the evidence that the shipwreck, and its

cargo as well, is abandoned and either embedded or eligible for inclusion in the National Register of Historic Places. Pet.App. A11.

In *Zych*, the controversy involved title to a vessel lost off Waukegan, Illinois, in 1860. The vessel lay in Illinois waters and Illinois claimed title pursuant to the ASA and three State laws. An insurer had paid off policies on the full value of the ship and its cargo, and Zych purchased the insurer's rights. Illinois intervened in Zych's *in rem* admiralty action and asked that the entire suit be dismissed or at a minimum that Illinois not be bound by any judgment because of its Eleventh Amendment immunity, citing *Florida Dept. of State* v. *Treasure Salvors*, 458 U.S. 670 (1982).

After reviewing the facts and this Court's opinion in *Treasure Salvors*, the Seventh Circuit held that the Eleventh Amendment barred the district court from determining Illinois' rights to the vessel. *Zych*, 960 F.2d at 670. In discussing why the *strength* of the State's legal position is irrelevant for Eleventh Amendment purposes the court stated:

> "[T]he court must determine whether the state has *some* interest. Michigan has no conceivable interest in the remains of the *Lady Elgin*, so an all-claimants injunction could not be thought to invade Michigan's privileges in violation of the eleventh amendment. In this sense, some view of the merits is inevitable. *Marx v. Guam*, 866 F.2d 294, 299-300 (9th Cir. 1989), on which Zych relies, establishes no more than this. We hold that it is the existence, and not the strength, of the claim that activates the eleventh amendment." (Emphasis in original.) *Id.*

Thus, in the Seventh Circuit, there is no "preponderance of the evidence" requirement. That Zych had subrogation rights from the insurer to the *vessel and the whole of its cargo* did not defeat Illinois' assertion of sovereign immunity. The location of the wreck in Illinois waters plus a claim of ownership under the State statute was enough to trigger the Eleventh Amendment.

The First Circuit has also determined unequivocally that the basis for and strength of a State's claim to a shipwreck need not be validated by a district court judge before a claim of Eleventh Amendment immunity will be honored. At issue in *Maritime Underwater Surveys, Inc.* v. *The Unidentified, Wrecked and Abandoned Sailing Vessel*, 717 F.2d 6 (1st Cir. 1983), were claims to the pirate ship *Whidah*, which foundered in a storm off Cape Cod in April 1717. After finding the vessel, Maritime Underwater Surveys brought an admiralty action *in rem*, seeking salvage rights and title to the wreck. The Commonwealth of Massachusetts filed a restricted appearance for the purpose of asserting that the Eleventh Amendment barred adjudication of the Commonwealth's claim to the vessel. The district court examined the Commonwealth's claim, found it "colorable," and dismissed the action. *Id.* at 7. The First Circuit affirmed, but made clear that the district court had gone too far in weighing the merits of the claim by Massachusetts:

> "[B]ecause of the Eleventh Amendment's flat prohibition of suits against states regardless of their merit, we need not reach the colorability of the Commonwealth's claim. . . . We . . . hold that when a state asserts title to antiquities lodged within the seabed under its authority, the Eleventh Amendment bars federal adjudication of the state's interest, absent its consent." *Id.* at 8.

Accord, *Fitzgerald* v. *Unidentified Wrecked and Abandoned Vessel*, 866 F.2d 16, 18 (1st Cir. 1989) (*in rem* action implicating Puerto Rico's claim to shipwreck barred "irrespective of the actual merit of . . . claim to the salvaged wreck and its treasures"). Both of these First Circuit cases were pre-ASA cases, but that does not vitiate their unequivocal holdings concerning the impropriety of district court inquiry into the basis and strength of a State's claim to a shipwreck, whatever its source or particulars.

Arrayed against these cases from the Seventh and First Circuits, however, are the decision below, and a recent case

from the Sixth Circuit, *Fairport International Exploration, Inc.* v. *The Shipwrecked Vessel Known As the Captain Lawrence*, No. 95-1783, 1997 U.S. App. LEXIS 1595 (6th Cir. Jan. 30, 1997).

Fairport involved an *in rem* admiralty complaint seeking title and salvage rights to the *Captain Lawrence*, a yacht that ran upon rocks and sank in Lake Michigan in 1933. The State of Michigan intervened to file a motion to dismiss, asserting a claim to the wreck under the ASA and immunity from suit under the Eleventh Amendment. The district court dismissed the suit, but only after requiring Michigan to prove its claim on the merits by a preponderance of the evidence. On Fairport's appeal, Michigan argued that the district court should have confined itself to determining the "existence of the claim, not its strength." *Id.* at 13. On the strength of the Ninth Circuit's opinion below, the Sixth Circuit rejected Michigan's argument:

> "[W]e hold that the district court did not err in requiring the State to prove by a preponderance of the evidence that it was entitled to Eleventh Amendment immunity. [Citation to *Brother Jonathan*.] We agree with the reasoning of *Brother Jonathan*, and find Michigan's argument, essentially that it should not have had to prove abandonment at all, unpersuasive." *Id.* at 16.

The Sixth Circuit accepted the whole of the Ninth Circuit's rationale below: that a federal court has jurisdiction to determine jurisdiction; that Eleventh Amendment immunity "should be treated as an affirmative defense, which must be proved by the party that asserts it and would benefit from its acceptance" (internal quotation marks omitted); and that, in assessing a claim that the ASA is applicable, the court is not really adjudicating a State's claim, because title is not transferred to a State by the ASA until after it is first determined whether the federal government has even asserted title to the shipwreck (that is, whether the elements of the ASA are met). *Id.* at 14–16.

II. THE NINTH CIRCUIT'S OPINION EFFECTIVELY NULLIFIES THE STATES' IMMUNITY FROM SUIT UNDER THE ELEVENTH AMENDMENT

The decision below denies Eleventh Amendment immunity to the States unless they have first actually proven in district court by a preponderance of the evidence the merits of their claim to a shipwreck on State submerged lands. And it is not just *any* claim that a State must prove, but a claim that establishes each element of State ownership under the ASA; other sources of State title are deemed "preempted" by the ASA (see heading III, *infra*).[3] This of course is the very thing that California would have to attempt if it had no sovereign immunity at all and was therefore subject to suit by private citizens in federal court. On the face of it, this result is fundamentally wrong; it renders the Eleventh Amendment meaningless. Such a requirement would be "equivalent to asserting that suits against a state are permitted by the eleventh amendment if the result is that the state loses." *Florida Dept. of State* v.

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3. The opinion below recognizes that, under the common law of finds, the States own abandoned shipwrecks that are embedded in their submerged lands:

> "Under the law of finds, title to property that is abandoned on or beneath the ocean vests in the first finder lawfully and fairly appropriating it and reducing it to possession with the intention of becoming its owner. However, an exception is made where the wreck is embedded in state or privately owned submerged lands, in which case, title vests in the owner of the land. *See Zych v. Unidentified, Wrecked, and Abandoned Vessel, Believed to be the SB "Seabird"*, 811 F. Supp. 1300, 1314 (N.D. Ill. 1992), *aff'd* 19 F.3d 1136 (7th Cir.), *cert. denied sub. nom. Zych v. Illinois Historic Preservation Agency*, __ U.S. __, 115 S.Ct. 420 (1994)." Pet.App. A5, n.3.

The court of appeals, however, erroneously viewed the law of finds as within the exclusive jurisdiction of the federal admiralty courts. *Id.* at n.3 and accompanying text; see heading III, *infra*. Apparently, State assertion of Eleventh Amendment immunity based on a claim under the law of finds has also been disposed of by the lower court's determination that the *Brother Jonathan* is not abandoned.

Treasure Salvors, Inc., 458 U.S. 670, 703 (1982) (White, J., concurring and dissenting, joined by then Associate Justice Rehnquist and Justices O'Connor and Powell).

Moreover, the principal justification for the lower court's adjudication of California's claim to the *Brother Jonathan*—that because federal courts have "jurisdiction to determine jurisdiction" they may, when the Eleventh Amendment is invoked, legitimately reach the merits of a State's substantive claim—was rejected by eight justices in *Treasure Salvors*, implicitly by the plurality, *see* 458 U.S. at 681–682, n.14, 699–700, and expressly by the four dissenting justices, *id.* at 702–703.[4]

The question is an important one. At stake is the ability of the States to develop and implement historic shipwreck management programs, free of federal admiralty court jurisdiction, which Congress determined was ill-adapted to protecting and preserving the cultural and historical resources that were the object of congressional concern in the ASA (see heading IV, *infra*). Forty States plus Guam and Puerto Rico have programs for the management, conservation, and orderly excavation and recovery of historic shipwrecks, or "historically

4. "The [court of appeals] believed that it had 'jurisdiction to decide jurisdiction' and could therefore determine who owned the artifacts in order to ascertain whether the suit was, in fact, an action against the State. By holding that '[t]he court did not have the power . . . to adjudicate the State's interest in the property without the State's consent,' *ante*, at 682, the Court properly rejects this novel conception of the Eleventh Amendment. [Footnote omitted.] The appellate court's approach to the jurisdictional issue is not consistent with our prior cases; it incorrectly assumes that a federal court may adjudicate a State's right to ownership of specific property within the possession of State officials without the State's consent. The approach is unsatisfactory because, as Judge Rubin noted in dissent, it 'is equivalent to asserting that suits against a state are permitted by the eleventh amendment if the result is that the state loses.'" 458 U.S. at 702–703 (White, J., concurring and dissenting, joined by then Associate Justice Rehnquist and Justices O'Connor and Powell).

significant" resources including shipwrecks.[5] The Ninth Circuit's decision puts these programs in jeopardy.

The importance of Eleventh Amendment jurisprudence transcends its application in the admiralty context. This Court has recently reaffirmed its venerable line of cases articulating the proper application of the Eleventh Amendment, and has clarified and narrowed the extremely limited circumstances in

5. Alabama, Ala. Code § 41-9-249.1 (1991); Alaska, Alaska Stat. § 41.35.200 (Michie 1996); Arizona, Ariz. Rev. Stat. § 41-842 (West 1992); Arkansas, Ark. Code Ann. § 16-6-210 (1995); Colorado, Colo. Rev. Stat. Ann. § 24-80-406 (1988); Delaware, Del. Code Ann. tit. 7, § 5302, et seq. (Michie 1996); Florida, Fla. Stat. Ann. § 267.13(2)(a) (West 1991); Georgia, Ga. Code Ann. § 12-3-81 (Harrison 1992); Guam, 21 Guam Code Ann. § 76306 (1995); Hawaii, Haw. Rev. Stat. § 6E-11 (1993); Idaho, Idaho Code § 67-4120 (1989); Illinois, 20 Ill. Comp. Stat. Ann. 3434/1 (West 1993); Indiana, Ind. Code Ann. § 14-21-1-16 (Michie 1995); Kentucky, Ky. Rev. Stat. Ann. § 164-720 (Michie 1994); Louisiana, La. Rev. Stat. Ann. § 41:1605(A) (West 1990); Maryland, Md. Code Ann. Art. 83B, §§ 5-611.1(b), 5-620 (1995); Massachusetts, Mass. Gen. L. Ann. ch. 6, § 180 (1996); Michigan, Mich. Comp. Laws Ann. §§ 324.76107, 324.76109, 324.76111 (West 1996); Minnesota, Minn. Stat. Ann. § 138.36 (West 1994); Mississippi, Miss. Code Ann. § 39-7-9 (1996); Missouri, Mo. Ann. Stat. § 253.420 (West 1997); New Hampshire, N.H. Rev. Stat. Ann. § 227-C-7 (1989); New Mexico, N.M. Stat. Ann. § 18-6-5(0) (Michie 1996); New York, N.Y. Pub. Lands § 75 (McKinney 1997); North Carolina, N.C. Gen. Stat. § 121-25 (1994); North Dakota, N.D. Cent. Code § 55-03-01.1 (1993); Ohio, Ohio Rev. Code Ann. § 1506.32 (Banks-Baldwin 1996); Oklahoma, Okla, Stat. tit. 53, § 361 (1991); Oregon, Or. Rev. Stat. § 273.728 (1994); Pennsylvania, 37 Pa. Cons. Stat. Ann. § 506(A) (West 1996); Puerto Rico, P.R. Laws Ann. tit. 18, §§ 1510-1513 (1989); Rhode Island, R. I. Gen. Laws § 42-45.1-5 (1993); South Carolina, S.C. Code Ann. § 54-7-650, et. seq. (Law Co-op. 1992); Tennessee, Tenn. Code Ann. § 11-6-105 (1996); Texas, Tex. Nat. Res. Code Ann. § 3191.093 (West 1993); Utah, Utah Code Ann. § 9-8-305 (1996); Vermont, Vt. Stat. Ann. tit. 22, § 762 (1997); Virginia, Va. Code Ann tit. 10.1, § 2214(C-D) (Michie 1993); Washington, Wash. Rev. Code § 27.53.060 (1997); West Virginia, W. Va. Code § 29-1-8B (Michie 1992); Wisconsin, Wis. Stat. § 44.47 (5m)(a)-(f) (1996); Wyoming, Wyo. Stat. Ann. § 36-1-114 (Michie 1994).

which Congress can abrogate the protections that the Amendment affords the States. *Seminole Tribe of Florida* v. *Florida*, __ U.S. __, 116 S.Ct. 1114, 1131 (1996) ("Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.") The decision of the Ninth Circuit below evidences remarkably little sensitivity to this body of constitutional law, and represents one further example of the Eleventh Amendment's erosion in that circuit. *See Natural Resources Defense Council* v. *Cal. Dept. of Transp.*, 96 F.3d 420 (9th Cir. 1996) (special concurrence by O'Scannlain, J., with Kleinfeld, J., joining) (expression of concern about "the persistent erosion of the Eleventh Amendment by expanding judicial exceptions within this circuit").

III. THE COURT OF APPEALS ERRED IN RULING THAT THE ASA "PREEMPTS" OTHER BASES FOR A STATE CLAIM TO THE *BROTHER JONATHAN*

The twin premises of the lower court's brief and conclusory preemption analysis, Pet.App. A7–A9, are both insupportable under this Court's precedents. It is not true that federal admiralty courts have exclusive jurisdiction to decide questions of maritime law. *See* 28 U.S.C. § 1333(1) ("saving to suitors" clause); Schoenbaum, Admiralty and Maritime Law (2d ed. 1994) §§ 4–1, 4–2, pp. 134–135 ("State courts have concurrent jurisdiction over *in personam* admiralty lawsuits, and substantive state law plays a key and often complex role."). This Court has held:

> "Aside from its inability to provide a remedy *in rem* for a maritime cause of action, this Court has said that a state, 'having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit' so long as it does not attempt to make changes in the 'substantive maritime law.'" *Madruga* v. *Superior Court*, 346 U.S. 556, 561 (1954), quoting *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924).

Nor is it true that the source of substantive maritime law is solely federal; maritime law takes its content from State law sources as well. *See Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 373 (1959); *Zych* v. *Unidentified Wrecked and Abandoned Vessel*, 19 F.3d 1136 (7th Cir.), *cert. denied sub. nom. Zych* v. *Illinois Historic Preservation Agency*, __ U.S. __, 115 S.Ct. 420 (1994);[6] Schoenbaum, *supra*, § 4–4, p. 143 ("[T]he actual scope of possible application of state law in admiralty is quite broad; there are several theories under which decisional law *or legislation* (italics added) may be applied in maritime cases.")[7]

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6. "The Constitution does not define the precise limits of admiralty and maritime jurisdiction, nor does it draw any obvious boundary between federal and local law. [Citations omitted.] Instead, the Constitution creates a highly intricate interplay between the state and national governments in their regulation of admiralty and maritime commerce and activities. [Citations omitted.] The states have a wide scope in this context, but their laws must, of course, yield to the needs of a uniform federal system. [Citations omitted.]" 19 F.3d at 1139.

7. At least 38 States plus Guam and Puerto Rico currently assert title to shipwrecks, or to "historically significant" resources including shipwrecks, a range of resources that is more inclusive than the "historic shipwrecks" covered by the ASA. Alabama, Ala. Code § 41-3-1 (1991); Alaska, Alaska Stat. § 41.35.230 (Michie 1996); Arizona, Ariz. Rev. Stat. § 41-841 (West 1992); Arkansas, Ark. Code Ann. § 13-6-302 (1995); Colorado, Colo. Rev. Stat. Ann. § 24-80-401 (1990); Delaware, Del. Code Ann. tit. 7, § 5301 (Michie 1996); Florida, Fla. Stat. Ann. § 267.061(b) (West 1991); Georgia, Ga. Code Ann. § 12-3-80 (Harrison 1990); Guam, 2 Guam Code Ann. § 76303 (1995); Hawaii, Haw. Rev. Stat. § 6E-7 (1993); Idaho, Idaho Code §§ 67-4113, 67-4119 (1989); Illinois, 20 Ill. Comp. Stat. Ann. 3435/02(a) (West 1993); Indiana, Ind. Code Ann. § 14-8-2-258 (Burns 1995); Kentucky, Ky. Rev. Stat. Ann. § 164-710 (Michie 1994); Louisiana, La. Rev. Stat. Ann. § 41:1605(A) (West 1990); Maine, Me. Rev. Stat. Ann. tit. 27, § 376 (1995); Maryland, Md. Code Ann. art. 83B, § 5-611.1(a) (1995); Massachusetts, Mass. Gen. L. Ann.

Preemption of State statutes by congressional enactments is not lightly to be presumed. *California Federal S. & L. Assn.* v. *Guerra*, 479 U.S. 272, 281 (1987). The basic assumption is that Congress did not intend to displace state law. *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981). Federal statutes impinging upon important state interests "cannot . . . be construed without regard to the implications of our dual system of government. . . ." *BFP* v. *Resolution Trust Corporation*, 511 U.S. 531, 544 (1994), quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L.Rev. 527, 539–540 (1947). The court of appeals' decision impinges on one of California's fundamental attributes of sovereignty: the ownership and control of its tide and submerged lands, which it holds in trust for its people. *Phillips Petroleum Co.* v. *Mississippi*, 484 U.S. 469, 473–477 (1988) ("broad statements of public trust dominion over tidelands have been included in this Court's opinions since the early 19th century").

In light of the principles of maritime law summarized above, the caution that should be observed by a court in reviewing a claim of preemption, and the congressional pur-

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ch. 6, § 180 (1996); Michigan, Mich. Comp. Law Ann. § 324.76102(2) (West 1996); Minnesota, Minn. Stat. Ann. § 138.31, (West 1994); Mississippi, Miss. Code Ann. § 39–7–9 (1996); New Hampshire, N.H. Rev. Stat. Ann. § 227–C:1 (1989); North Carolina, N. C. Gen. Stat. § 121–22, et seq. (1994); North Dakota, N.D. Cent. Code § 55–03–00.1 (1993); Ohio, Ohio Rev. Code Ann. § 1506.33 (Banks–Baldwin 1996); Oklahoma, Okla, Stat. tit. 53, § 361 (1991); Oregon, Or. Rev. Stat. § 358.905 (1994); Pennsylvania, 37 Pa. Cons. Stat. Ann. § 506(A) (West 1996); Puerto Rico, P.R. Laws Ann. tit. 18, § 1504 (1989), Rhode Island, R.I. Gen. Laws § 42–45:1–3 (1997); South Carolina, S.C. Code Ann. § 54–7–610, et seq. (Law Co–op 1992); Tennessee, Tenn. Code Ann. § 11–6–101 (1996); Texas, Tex. Nat. Res. Code Ann. § 191.091 (West 1993); Utah, Utah Code Ann. § 9–8–302 (1996); Vermont, Vt. Stat. Ann. tit. 22, § 762 (1987); Washington, Wash. Rev. Code § 27.53045 (1997); West Virginia, W. Va. Code § 29–1–8B (Michie 1992); Wisconsin, Wis. Stat. § 44.47 (1)(i) (1996); Wyoming, Wyo. Stat. Ann. § 36–1–114 (Michie 1994).

pose in enacting the ASA—to help the States, not hinder them, in the management of their tide and submerged lands—there is no preemption here. There is simply no basis for concluding that State statutes such as sections 6309, 6313, and 6314 of the California Public Resources Code, which are aimed at protecting "the historic, scientific, and cultural values inherent in submerged antiquities," Pet.App. A72; see n.1, *supra*, are "preempted" by the simple circumstance that some types of maritime litigation are exclusively for federal admiralty courts to adjudicate. And even regarding those *in rem* proceedings within the exclusive admiralty jurisdiction of the federal courts, State law still has a role to play in supplementing the general body of maritime law.

The cursory preemption analysis in the Ninth Circuit's opinion is therefore without support. Section 6313 and the law of finds, *see* footnote 3, *infra*, remain independent and "colorable" bases for California's claim of title to the *Brother Jonathan*, quite apart from the State's claim under the ASA. Contrary to the assertion of the court of appeals, these claims afford an additional basis for California's invocation of sovereign immunity.

IV. THE LOWER COURT'S RESTRICTIVE DEFINITION OF WHAT SHIPWRECKS ARE "ABANDONED" CREATES AN INTER-CIRCUIT CONFLICT AND WILL DENY THE PROTECTIONS OF THE ASA TO MANY HISTORIC SHIPWRECKS

The opinion below renders successful State assertions of ownership under the ASA extremely problematic. According to the opinion, the finding that a mere portion of the cargo of an historic shipwreck has not been abandoned means that a State loses title to the remainder of the cargo and the vessel itself, even if the remainder of the cargo and the vessel are in fact abandoned. Pet.App. A17–A19. As the court of appeals itself notes, Pet.App. A18, one of the premises for this holding—its insistence on maintaining a "unitary *res*"—directly

conflicts with the view of the Fourth Circuit, which does not insist upon there being a single owner of a shipwreck and its cargo, but instead allows for the possibility that ownership of the vessel and of different portions of the cargo may rest with different parties. *Columbus-America Discovery* v. *Atlantic Mutual Insurance Co.*, 974 F.2d 450, 465 (4th Cir. 1992).

The Ninth Circuit interpretation of the ASA also runs directly contrary to the Act's avowed purpose. Congress estimated that five to ten percent of the some 50,000 shipwrecks located beneath navigable waters in this country needed the protection of State-adopted programs of shipwreck management. H.R. Rep. No. 100-514, 100th Cong., 2d Sess., Pt. I (1988), *reprinted in* 1988 U.S.C.C.A.N. 365. In enacting the ASA, Congress recognized that historic shipwrecks were "irreplaceable State resources for tourism, biological sanctuaries, and historical research," 43 U.S.C. § 2103(a)(1), declared that it was congressional policy that the States allow for "appropriate" public and private sector recovery of shipwrecks in a manner "consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites," *id.* at § 2103(a)(C), and directed the Secretary of the Interior to issue guidelines that would provide for the "comprehensive management of underwater resources related to historic shipwrecks" and that would seek to "maximize enhancement of cultural resources," *id.* at § 2104(a).

A principal purpose of the ASA was to remove control over historic shipwrecks from the federal admiralty courts and to dispel confusion and conflict created by conflicting decisions from those courts concerning ownership of historic shipwrecks as between the States and private salvors. H.R. Rep. No. 100-514, 100th Cong., 2d Sess., Pt. I (1988), *reprinted in* 1988 U.S.C.C.A.N. 366;[8] H.R. Rep. No. 100-514, 100th

8. The House Report, Part I, stated:

> "There is currently confusion over the ownership and authority to manage abandoned shipwrecks. States have claimed title to, and regulatory authority over, abandoned historic shipwrecks located on submerged lands under their jurisdiction. The Federal Admiralty Courts have also claimed jurisdiction over the salvage of these resources.
>
> "Admiralty law, developed in the ancient Mediterranean and subsequently modified by English and American legal history, developed to encourage the salvage of commercial goods. Its focus is commercial, not cultural resource management or recreation. Aspects of Admiralty law most applicable here are the "Law of Finds"—the principle that the person finding the shipwreck can claim ownership to it—and the "Law of Salvage"—which awards those who perform acts of salvage a portion of the goods retrieved. Historic shipwrecks that contain both historic information and tangible artifacts are subject to salvage operations, with resultant loss of historical information and artifacts to the public." *Id.*

Cong., 2d Sess., Pt. II (1988) *reprinted in* 1988 U.S.C.C.A.N. 371, 377;[9] S. Rep. No. 100-241, 100th Cong., 1st Sess. 3-4, 6-7 (1987). Congress was animated by a concern that the careless, archaeologically unsound recovery of historic shipwrecks, solely for the economic value of their artifacts and without sufficient oversight from historians and trained archaeologists, would result in the destruction of invaluable and irreplaceable cultural and historical resources. *Id.* It felt that traditional admiralty law, deriving solely from a concern with the commercial rights of shipowners and

9. The House Report, Part II, stated:

> "The purpose of S. 858 is to vest title to certain abandoned shipwrecks that are embedded in or located on State lands to the respective States and clarify the management authority of the States for these abandoned shipwrecks.
>
> ". . . .
>
> "Congress did not specify in the [Submerged Lands Act] whether the states also owned non-natural objects such as shipwrecks that rested on or within submerged lands. Notwithstanding this lack of clarity, some 28 States have laws that pertain to the management of abandoned or historic shipwrecks in state waters. It is estimated that the total number of shipwrecks in State waters is more than 50,000, of which some 5-10 percent may be of historical significance." *Id.* at 370.

salvors, did not afford consideration to archaeological or historical factors in determining who was entitled to recover a shipwreck. *Id.*

The court of appeals' insistence on complete abandonment also directly conflicts with the implementing guidelines issued by the Secretary of the Interior in response to the mandate of 43 U.S.C. § 2104. The Guidelines expressly state that a vessel is not abandoned "[w]hen the owner of a sunken vessel is paid *the full value* of the vessel." (Italics added.) Abandoned Shipwreck Act Guidelines, 55 Fed.Reg. 50116, 50120–21 (1990). The necessary implication is that a vessel is deemed abandoned under the ASA if an insurer has not paid a claim for its full value. By force of reasoning, a vessel and portions of its cargo on which *no* insurance claims have been paid are abandoned for purposes of the ASA.[10]

The decision below largely nullifies the salutary purpose of Congress in enacting the ASA. On the simple showing that a mere portion of the cargo of an historic shipwreck has not been abandoned, both the shipwrecked vessel and the remainder of its cargo will be stripped of the protections intended by Congress and, in far too many cases, left at the mercy of untrained salvors motivated by profit rather than respect and concern for the cultural and historical value of the shipwreck. That is clearly not what Congress had in mind.

The holding is particularly unfortunate because it will

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10. While DSR submitted an agreement between it and two insurance companies which recites that the companies' predecessors paid insurance claims on the vessel or portions thereof, there is no proof in the record that the vessel was insured, or that any insurance claims were paid on it. DSR's declaration is careful to leave this ambiguous, stating only that insurance claims were paid for "the loss of the [vessel] *or its cargo.*" (Italics added.) Newspaper articles at the time, however, describe the insurance as only for the cargo, *not* the vessel. Moreover, there is no proof that any insurance company ever undertook any of the salvage efforts that the insurance companies did in *Columbus-America Discovery* v. *Atlantic Mutual Insurance Co.*, 974 F.2d 450 (4th Cir. 1992), which kept the companies' claims there from being abandoned. *See id.* at 467.

doubtless be looked upon by state courts who are called upon to interpret the ASA as persuasive authority on what is, after all, a question of federal law. Accordingly, this highly restrictive interpretation of "abandoned" under the ASA merits correction now by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted to resolve conflicts among the circuits and to provide guidance to federal and state courts throughout the country concerning ownership and control of the thousands of historic shipwrecks that lie upon State-owned submerged lands.

Respectfully submitted,

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March 1997

APPENDIX A

In the United States Court of Appeals
for the Ninth Circuit

No. 95-15693
D.C. No. CV-91-03899-LCB

For Publication

Deep Sea Research, Inc.,
Plaintiff-Appellee,

v.

The Brother Jonathan, her
Appurtenances, furniture, cargo, etc.,
Defendant,

and

State of California;
State Lands Commission,
Defendants-Intervenors-Appellants,

United States of America,
Defendant-Intervenor.

Appeal from the United States District Court
for the Northern District of California
Louis Charles Bechtle, District Judge, Presiding

Argued and Submitted
February 13, 1996—San Francisco, California

[Filed July 17, 1996
Amended December 4, 1996]

ORDER AMENDING OPINION, DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC AND AMENDED OPINION

Before: Mary M. Schroeder, Dorothy W. Nelson, and Alex Kozinski, Circuit Judges

Opinion by Judge D.W. Nelson

ORDER

The opinion filed on July 17, 1996, slip op at 8673, is amended as follows:

Slip op at 8688, third line from top, after "Thus, a federal court may adjudicate the question of whether a wreck meets the requirements of the ASA without implicating the Eleventh Amendment,": insert footnote 5

> This is not to say that Congress abrogated the Eleventh Amendment immunity of the States by the ASA. The Supreme Court has stated that "the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1131 (1996). Here, however, we make a threshold determination of whether the state can assert a claim to the *Brother Jonathan* under the ASA. That decision is properly within the federal court's jurisdiction.

Slip op at 8690: renumber footnote 5 as footnote 6.

With this amendment, the panel has voted to deny the Defendants-intervenors-Appellants' petition for rehearing. Judges Schroeder and Kozinski voted to reject the suggestion for hearing en banc, and Judge D.W. Nelson so recommended.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

D.W. NELSON, Circuit Judge:

Appellee Deep Sea Research ("DSR") brought this *in rem* admiralty action seeking salvage rights and title to the wreck of the *Brother Jonathan*, a double paddle wheel steamer that sank in 1865 off the coast of Crescent City, California. After nineteen years of searching, DSR claims to have discovered the *Brother Jonathan* and has stipulated for the purposes of these proceedings that it is located upon submerged lands of the State of California. The State of California intervened for the limited purpose of asserting that it has a colorable claim of ownership to the wreck and that as a result, the district court is barred by the Eleventh Amendment from adjudicating DSR's claim.

The State argues that it has a colorable claim to ownership under the Abandoned Shipwreck Act of 1987 ("ASA"), 43 U.S.C. §§ 2101–2106, the Submerged Lands Act ("SLA"), Chs. 65, 67 Stat. 29 (1953) (codified in relevant parts at 43 U.S.C. §§ 1311–1315), and Cal. Pub. Res. Code § 6313. After an evidentiary hearing, the district court held that the State had failed to establish a colorable claim to ownership and rejected its motion to dismiss the claim. *Deep Sea Research, Inc. v. Brother Jonathan*, 883 F. Supp. 1343, 1363–64 (N.D. Cal. 1995). The State appeals.

The United States intervened to defend the constitutionality of the ASA. The Columbus-America Discovery Group[1] has filed an *amicus curiae* brief in which it argues that this circuit

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1. The Columbus-America Discovery Group is a multidisciplinary team of scientists, engineers, historians and entrepreneurs devoted to exploring the deep ocean and searching for sunken treasure.

should not adopt the rule of the Fourth Circuit, which requires an express renunciation of ownership in order to establish abandonment.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

DSR filed this *in rem* admiralty action in November, 1991, seeking to perfect its title to and salvage rights in the wreck of the *Brother Jonathan*. At the initiative of DSR, the case was dismissed without prejudice in June 1992, and reopened in February 1994, a few months after DSR actually discovered the wreck. DSR had been searching for the wreck of the *Brother Jonathan* for almost twenty years. Until DSR discovered the wreck, neither the State nor anyone else knew its location, and the State had not made any attempt to locate the wreck. DSR asserts title to the wreck as the assignee of the subrogation rights of two insurance companies that paid claims on the cargo of the *Brother Jonathan*. However, according to newspaper accounts published at the time of the disaster (the only records anyone has unearthed), about two thirds of the cargo on board was uninsured. Neither is there any evidence that the ship itself was insured.

The State intervened and moved to dismiss, arguing that the wreck belonged to the State under both the ASA and Cal. Pub. Res. Code § 6313. It asserted that even though the State was not named in the complaint, the suit was, in reality, against the State and therefore barred by the Eleventh Amendment. The State also argued that because the wreck met the requirements of the ASA, the district court lacked subject matter jurisdiction over DSR's claim.

Under the ASA, the federal government asserts title to certain historic wrecks and transfers it to the states on whose submerged lands the wrecks are found. 43 U.S.C. § 2105. A shipwreck meets the requirements of the ASA if it is 1) abandoned; 2) located on a state's submerged lands; and 3) either embedded in the sea floor or determined eligible for

listing in the National Register of Historic Places ("National Register"). *Id.*

In cases involving wrecks that fall under the ASA, the traditional admiralty law of salvage[2] and finds[3] does not apply. 43 U.S.C. § 2106(a). Instead, these wrecks are governed by the provisions of the ASA. As a result, the fate of these vessels may be determined in state or federal court. However, the statute makes clear that the "laws of the United States relating to shipwrecks" shall continue to apply to all other wrecks. Thus, the federal courts retain exclusive admiralty jurisdiction over cases involving wrecks that do not meet the requirements of the ASA. 43 U.S.C. § 2106(b).

Section 6313 of the California Public Resources Code is broader than the ASA, because under that provision California asserts title to *all* abandoned shipwrecks on state-owned submerged lands. Under the SLA, the state owns all submerged lands within three miles of the mean high tide. 43 U.S.C. §§ 1301, 1311.

The district court held two evidentiary hearings on the State's motion to dismiss. The first hearing, in September 1994, was devoted to the issue of whether the *Brother Jona-*

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2. Under the law of salvage, the salvor of an imperiled vessel is entitled to a liberal salvage award from the *res* of the vessel. Salvage awards are intended to advance the public policy goal of encouraging those who come upon imperiled vessels to take the often costly and dangerous steps necessary to recover property in the absence of a negotiated agreement. *See Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450, 459 (4th Cir. 1992).

3. Under the law of finds, title to property that is abandoned on or beneath the ocean vests in the first finder lawfully and fairly appropriating it and reducing it to possession with the intention of becoming its owner. However, an exception is made where the wreck is embedded in state or privately owned submerged lands, in which case, title vests in the owner of the land. *See Zych v. Unidentified, Wrecked, and Abandoned Vessel, Believed to be the SB "Seabird"*, 811 F.Supp. 1300, 1314 (N.D. Ill. 1992), *aff'd* 19 F.3d 1136 (7th Cir.), *cert. denied sub. nom. Zych v. Illinois Historic Preservation Agency*, 115 S.Ct. 420 (1994).

than was located on state submerged lands. DSR subsequently stipulated that it was. At the second hearing, the parties addressed the issues of abandonment, embeddedness and the historical significance of the wreck.

The district court denied the State's motion to dismiss, holding that the State had not established a colorable claim to the wreck of the *Brother Jonathan* under the ASA. *Deep Sea Research*, 883 F. Supp. at 1357. The court reasoned, based on *ITSI TV Productions, Inc. v. Agricultural Ass'ns*, 3 F.3d 1289 (9th Cir. 1993), that a party asserting sovereign immunity must prove by a preponderance of the evidence that the privilege applies. *Deep Sea Research*, 883 F. Supp. at 1349. The court determined that the State did not establish by a preponderance of the evidence that the wreck of the *Brother Jonathan* was abandoned, embedded or eligible for listing in the National Register. *Id.* at 1357. It further held that the ASA preempts Cal. Pub. Res. Code § 6313 to the extent that § 6313 asserts title to shipwrecks that are beyond the scope of the ASA. Because it held that the ASA did not apply to the *Brother Jonathan*, the court did not reach DSR's challenge to the constitutionality of the ASA.

The State appeals, arguing that it need not demonstrate by a preponderance of the evidence that the wreck of the *Brother Jonathan* meets the requirements of the ASA in order to make a colorable claim of ownership and qualify for Eleventh amendment immunity. It asserts that under *Marx v. Government of Guam*, 866 F.2d 294 (9th Cir. 1989), it has demonstrated all that is necessary to make a colorable claim to the *Brother Jonathan*. It also asserts that the district court erroneously held that the ASA preempts Cal. Pub. Res. Code § 6313. Finally, the State challenges the district court's exclusion of the audio portion of a video tape that suggests that the *Brother Jonathan* is, in fact, embedded in the ocean floor.

STANDARD OF REVIEW

The district court's determination that the State was required to demonstrate by a preponderance of the evidence that it had a colorable claim to the *Brother Jonathan* in order to qualify for Eleventh Amendment immunity is a legal question, which we review de novo. *Twenty-Three Nineteen Creekside, Inc. v. Commissioner*, 59 F.3d 130, 131 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 1034 (1996). Similarly, we review de novo the district court's holding that the ASA preempts Cal. Pub. Res. Code § 6313. *Id.* We review for clear error the district court's factual determination that the *Brother Jonathan* does not meet the requirements of the ASA. Fed. R. Civ. P. 52(a); *Campbell v. Wood*, 18 F.3d 662, 681 (9th Cir.) (en banc), *cert. denied*, 114 S.Ct. 2125 (1994). Finally, the district court's exclusion as hearsay of the audio portion of the video tape that may suggest the *Brother Jonathan* is embedded is reviewed for abuse of discretion. *United States v. Gilbert*, 57 F.3d 709, 711 (9th Cir. 1995).

ANALYSIS

I. *Preemption of Cal. Pub. Res. Code § 6313 by the ASA*

The State challenges the district court's holding that the ASA preempts Cal. Pub. Res. Code § 6313 insofar as § 6313 asserts title to shipwrecks that are not covered by the ASA. *See Deep Sea Research*, 883 F. Supp. at 1359. This provision grants the state title to all abandoned shipwrecks located on its submerged lands that are more than fifty years old or of special historical significance.[4] According to the State, the

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4. Cal. Pub. Res. Code § 6313 provides in relevant part:

(a) The title to all abandoned shipwrecks and all archaeological sites and historic resources on or in the tide and submerged lands of California is vested in the state.

(b) As used in this section, "submerged archaeological site" and "submerged historic resource," shall be given the broadest possible

district court erroneously construed § 7 of the ASA as explicitly preempting the California provision. Section 7 provides that the Act "shall not change the laws of the United States relating to shipwrecks other than those to which this chapter applies." 43 U.S.C. § 2106(b). The State argues that because state law is incorporated into federal maritime law, § 7 of the ASA does not preempt Cal. Pub. Res. Code § 6313. The State's argument is incorrect.

Federal law can preempt a state statute either by explicit language in the statute or when the intent of Congress to preempt state action is "implicit from a pervasive scheme of federal regulation that leaves no room for state and local supplementation." *Barber v. State of Hawaii*, 42 F.3d 1185, 1189 (9th Cir. 1994). Federal law also may preempt state law when there is an actual conflict between state and federal law. *Id.* Section 7 of the ASA makes clear that Congress intended to transfer title to the states only for shipwrecks that meet the requirements of the ASA. All other shipwrecks continue to be subject to the exclusive admiralty jurisdiction of the federal courts, as provided by Article III, section 2 of the United States Constitution. Cal. Pub. Res. Code § 6313 takes title to shipwrecks that do not meet the requirements of the ASA and which are therefore within the exclusive admiralty jurisdiction of the federal courts. Thus, the district court correctly held that § 6313 is preempted to the extent that it gives the State

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meaning, to include any submerged object, structure . . . or vessel and any associated cargo, armament, tackle, fixture, human remains, or remnant thereof, . . . which is historically or archaeologically significant. . . .

(c) Sites with archaeological or historical significance shall be determined by reference to their eligibility for inclusion in the National Register of Historic Places. Any submerged archaeological site or submerged historic resource remaining in state waters for more than 50 years shall be presumed to be archaeologically or historically significant.

title to shipwrecks that do not meet the requirements of the ASA.

II. *The State's Entitlement to Eleventh Amendment Immunity*

The State argues on appeal that the district court erred in holding that the State did not have a colorable claim to the *Brother Jonathan* and therefore was not entitled to immunity under the Eleventh Amendment. First, the State contends, the district court should not have required it to demonstrate by a preponderance of the evidence that it met the criteria of the ASA in order to make a colorable claim to the *Brother Jonathan*. Rather, it argues, this case is governed by *Marx v. Government of Guam*, 866 F.2d 294 (9th Cir. 1989). In that case, the 9th Circuit held that the government of Guam had made a colorable claim to an abandoned shipwreck by demonstrating that the shipwreck in question was on state submerged lands and that one of Guam's statutes asserted ownership to shipwrecks located on state submerged lands. 866 F.2d at 300–301. According to the State, in order to make a colorable claim in this case, it need only assert that the *Brother Jonathan* is on its submerged lands and that Cal. Pub. Res. Code § 6313 vests title in the State to abandoned shipwrecks on its submerged lands.

The State also challenges the district court's holding that the *Brother Jonathan* was not abandoned or embedded, arguing that it has a colorable claim to the shipwreck under the ASA as well. In addition to arguing that the State presented adequate evidence of both abandonment and embeddedness, the State contends that the district court applied the wrong test with respect to abandonment. The State argues that the district court erroneously required that abandonment be shown by an affirmative act on the part of the original owner demonstrating intent to renounce ownership.

A. *Requirements for Making a Colorable Claim to the* Brother Jonathan

The State argues that the Eleventh Amendment limits the showing required to make a colorable claim to ownership of an abandoned shipwreck. It reasons that "[i]f a state has to prove the merits of its ownership claim in order to establish its Eleventh Amendment immunity, then it has no Eleventh Amendment immunity." Thus, in cases involving a state's assertion of ownership of wrecks on its submerged lands, the State asserts, it is inappropriate to adopt the rule of *ITSI TV*, which requires that the State demonstrate by a preponderance of the evidence that it is entitled to immunity. 3 F.3d 1289, 1292 (9th Cir. 1993). Rather, citing *Marx v. Government of Guam*, the State asserts that it should be required to demonstrate only that the shipwreck is on state submerged lands and that there is a state statute giving it title to shipwrecks on its submerged lands. The State's argument is without merit.

In *Marx v. Government of Guam*, Guam claimed two shipwrecks located on its submerged lands and argued that sovereign immunity precluded the exercise of federal jurisdiction over the wrecks in an *in rem* admiralty action. 866 F.2d at 295. The court expressly did not base its decision on the ASA because that case was initiated prior to that statute's adoption and that Act specifically exempts such proceedings. *Id.* at 300; *see* 43 U.S.C. § 2106(c). Rather, its decision was based on Guam's Underwater Historic Property Act, which conveyed to Guam broad title and control over property located on its submerged lands. *Id.* at 300–301. The court rejected the argument that adoption of the ASA indicated that the previously enacted Guam statute was invalid, finding that in adopting the ASA Congress "merely wanted to clarify the effect of the Submerged Lands Act and did not intend to express an opinion about preexisting law." *Id.* On the basis of the Guam statute and the Submerged Lands Act, 43 U.S.C. § 1311, the court found that Guam had a "colorable claim" to

wrecks and dismissed the case on the basis of Guam's sovereign immunity.

The State of California asserts that the facts in this case are virtually identical to those in *Marx v. Government of Guam* because the *Brother Jonathan* is located on California's submerged lands and Cal. Pub. Res. Code § 6313 asserts title to abandoned shipwrecks on state submerged lands. Thus, it argues, it has made an adequate showing to establish a colorable claim to the *Brother Jonathan* and this case should be dismissed on the basis of sovereign immunity.

However, the State's argument fails to take into account the impact of the adoption of the ASA on the requirements for making a colorable claim to a wreck. In adopting the ASA, Congress preempted state laws which purported to take title to all shipwrecks on their submerged lands, at least to the extent that such laws took title to shipwrecks that did not meet the requirements of the ASA. Thus, while the Government of Guam was able to make a colorable claim under its broad statute, it follows that a more extensive showing is required in this case, in which the ASA applies, to make a colorable claim to the *Brother Jonathan*.

Furthermore, a federal court has both the power and duty to determine whether a case falls within its subject matter jurisdiction. *See United States v. United Mine Workers of America*, 330 U.S. 258, 291 (1947); *see also* Seabird, 811 F. Supp. at 1312 fn. 9 ("Presumably, the ASA does not affect the federal court's jurisdiction to resolve questions relating to its jurisdiction."). Therefore, it was appropriate for the district court to require the State to present evidence that the ASA applied to the *Brother Jonathan, i.e.*, that it was abandoned and either embedded or eligible for listing in the National Register, before dismissing the case. Otherwise, as DSR points out, the State could receive immunity simply by asserting that it was entitled to it. For a federal court to renounce jurisdiction over an admiralty case on the basis of a mere assertion of entitlement to immunity on the part of the State is

inconsistent with the court's duty to assess whether it has jurisdiction.

The State also argues that the district court erroneously relied on *ITSI TV* in imposing on the State the burden of proving by a preponderance of the evidence that the ASA applies to the *Brother Jonathan*. In *ITSI TV*, this court addressed the question, "who bears the burden of persuasion when a putative state entity claims immunity from suit in federal court under the Eleventh Amendment?" 3 F.3d at 1291. There, a television production company sued California State Fair and Exposition and various district agricultural associations for copyright infringement. *Id*. The defendants moved to dismiss on the ground that they were arms of the State and therefore were immune from suit under the Eleventh Amendment. *Id*. They further argued that because Eleventh Amendment immunity is a jurisdictional bar, the burden is on the plaintiffs to establish that the defendants are not entitled to such immunity. *Id*.

The court rejected the defendants' argument, holding instead that "Eleventh Amendment immunity, whatever its jurisdictional attributes, should be treated as an affirmative defense," which "must be proved by the party that asserts it and would benefit from its acceptance." *Id*. In reaching this conclu[illegible] the court drew on the law governing the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. §§ 1330, 1602–11, and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346. Both acts place the burden on the defendant to prove that it is entitled to immunity, and the former explicitly requires that the defendant demonstrate its entitlement to immunity by a preponderance of the evidence. *Id*. at 1292. The court in *ITSI TV* also points out that Eleventh Amendment immunity is most likely to be the subject of dispute when a "complex institutional arrangement makes it unclear whether a given entity ought to be treated as an arm of the State." *Id*. Because the details of these institutional arrangements are "peculiarly within the knowledge of the party claiming immunity," considerations of fairness support placing the burden of proof

on the party claiming to be a state entity. *Id*. (internal quotations omitted).

The State argues that this case is distinguishable from *ITSI TV* because it does not concern the defendant's status as a state entity. Rather, to determine whether or not the State was entitled to immunity, the district court in this case evaluated the strength of the State's claim to title of the *Brother Jonathan* under the ASA and Cal. Pub. Res. Code § 6313. As a result, the district court required the State to prove by a preponderance of the evidence that the shipwreck was abandoned and that it was embedded in the ocean floor or eligible for listing in the National Register. The State argues that facts relating to these questions, in contrast to the one at issue in *ITSI*, are not "peculiarly within the knowledge of the party claiming immunity," but instead, within the knowledge of DSR. Therefore, the State argues, the burden should be on DSR rather than the State to demonstrate that the State does not have a colorable claim to the *Brother Jonathan*. *Id*.

While the State is correct that the factual question in *ITSI TV* differs from the one at issue in this case, it does not follow that the burden should be on the plaintiff to establish that the State is immune under the Eleventh Amendment. In *ITSI TV*, the court draws analogies to both the FSIA and the FTCA. In doing so, it makes no distinction between cases involving the defendant's status as an agent of the State and cases in which a party's entitlement to immunity turns on other issues. Further, the State of California cites no authority for the proposition that such a distinction should be made. We find that, according to the reasoning of the court in *ITSI TV*, the party asserting immunity has the burden to establish that it is entitled to immunity even if the determination of that issue touches the merits of the claim.

Finally, in addressing the questions of abandonment, embeddedness, and historical significance of the wreck under the ASA, a federal court does not adjudicate the state's rights. The ASA does not vest title to wrecks that satisfy its requirements directly in the state. Rather, it provides that the *federal*

government may assert title to such wrecks. *See* 43 U.S.C. § 2105(a). Only after the federal government takes title to the abandoned shipwreck may title then be transferred to the state. 43 U.S.C. § 2105(c). Thus, a federal court may adjudicate the question of whether a wreck meets the requirements of the ASA without implicating the Eleventh Amendment.[5] Therefore, we hold that the district court did not err in requiring the State to prove by a preponderance of the evidence that it was entitled to Eleventh Amendment immunity.

B. *Validity of District Court's Factual Determination that the* Brother Jonathan *Was Not Abandoned*

The State challenges the district court's holding that the *Brother Jonathan* is abandoned. It argues that the district court erroneously required the State to demonstrate affirmative intent on the part of the owner to abandon. Instead, the State asserts, the district court should have found that the State made a colorable claim to abandonment because the original owner of the ship is long gone and the wreck has lain undisturbed on the bottom of the ocean for 130 years. Further, the State argues, even if the insurers of the *Brother Jonathan* did not abandon title, at least a portion of the wreck is abandoned because only part of the cargo was insured and the vessel itself was not insured.

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5. This is not to say that Congress abrogated the Eleventh Amendment immunity of the States by the ASA. The Supreme Court has stated that "the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1131 (1996). Here, however, we make a threshold determination of whether the state can assert a claim to the *Brother Jonathan* under the ASA. That decision is properly within the federal court's jurisdiction.

1. Test for abandonment

The ASA does not define the term "abandonment." Thus, Congress presumably intended that courts apply the definition of abandonment that has evolved under maritime law. Traditionally, maritime law has found abandonment when title to a vessel has been affirmatively renounced, or when circumstances give rise to an inference that the vessel has been abandoned; courts have found abandonment, for instance, when a vessel is "so long lost that time can be presumed to have eroded any realistic claim of original title." *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987).

The Fourth Circuit in *Columbus-America* reversed the district court's finding that even though a number of insurance companies had paid claims on a wreck in 1857, the insurance companies had abandoned their title to the wreck. *Id.* at 468. The district court inferred abandonment by the insurance companies on the basis of its finding that the insurance companies had made no efforts to find the wreck and had destroyed any documentation they once had concerning the case. *Columbus-America Discovery Group v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 742 F. Supp. 1327, 1344–45 (E.D. Va. 1990), *rev'd* 974 F.2d 450 (4th Cir. 1992). In holding that abandonment could only be found on the basis of an express renunciation of ownership, the Fourth Circuit introduced a significant modification into maritime law. *See Columbus-America*, 974 F.2d at 472 (Widener, J., dissenting). The State of California argues that the district court erred by adopting the Fourth Circuit's rule in this case, rather than relying on the traditional approach to abandonment which allows abandonment to be inferred on the basis of circumstantial evidence.

Although the district court in this case cites the Fourth Circuit's decision in *Columbus-America*, its holding that the *Brother Jonathan* is not abandoned rests on the traditional rule

that a wreck is not abandoned unless either 1) title is affirmatively renounced *or* 2) abandonment can be inferred from the lapse of time or failure to pursue salvage efforts on the part of the owners. The district court states:

> Herbert's testimony [the only testimony offered by the State on the issue of abandonment], by itself, does not provide a sufficient basis for the court to conclude that the owners of the *Brother Jonathan* have taken a 'clear and unmistakable affirmative act to indicate a purpose to repudiate ownership' in the *Brother Jonathan* and its cargo. *In addition, the State has failed to provide sufficient evidence to demonstrate that the* Brother Jonathan *has been abandoned due to the lapse of time, or because the owners of the vessel have failed to undertake salvage efforts.*

883 F. Supp. at 1352 (emphasis added). Thus, the State's argument that the district court applied the wrong test lacks merit.

Further, the district court's failure to infer abandonment from the evidence presented by the State was not clearly erroneous. DSR presented a newspaper article dating from the time of the wreck listing a number of insurance companies that insured the cargo of the *Brother Jonathan*. These insurance companies took title to at least part of the wreck by right of subrogation and under the ASA regulations when they paid claims on the *Brother Jonathan*.[6] DSR also presented evidence of agreements it reached with two of the insurance

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6. The ASA guidelines specify that:

> When the owner of a sunken vessel is paid the full value of the vessel (such as receiving payment from an insurance underwriter) the shipwreck is not considered to be abandoned. In such cases, title to the wrecked vessel is passed to the party who paid the owner.

Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50120 (1990).

companies assigning title to the wreck to DSR. Finally, DSR presented undisputed evidence that the technology required to salvage the *Brother Jonathan* has been developed only in the last few years, so that successful salvage efforts would have been impossible until very recently. When the technology to conduct salvage operations has been developed recently, failure on the part of an owner to attempt to salvage the wreck does not give rise to an inference that the owner has abandoned title to the vessel. *See, e.g., Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB "Lady Elgin"*, 755 F. Supp. 213, 216 (N.D. Ill. 1990), amended 1991 WL 2536 (1991).

In response, the State presented a single witness on the issue of abandonment, who had conducted only twenty-two hours of research in the week before the hearing and did not know whether the insurance companies who paid claims on the *Brother Jonathan* had conducted any salvage efforts. Thus, the State presented the district court with no evidence that the insurance companies intended to abandon the wreck. The district court did not clearly err in finding that the insurance companies did not abandon title.

2. Partial abandonment

The State argues, however, that even if the insurance companies did not abandon title to the *Brother Jonathan*, they held title to only the part of the cargo for which they paid claims. Thus, the State asserts, the portion of the wreck that was uninsured should be considered abandoned, as there is no one before the court claiming ownership of that part of the wreck. In support of its argument, the State points to the ASA Guidelines, which specify that title passes to an insurer when the insurer has paid the *full* value of the vessel to the owner. ASA Guidelines, 55 Fed. Reg. 50120–21 (1990). The district court responded by noting that it is "premature for the court to find that any individual items of cargo or personal property have been abandoned," pointing out that when the discovery

of the wreck gains publicity, additional claimants are likely to come forward. *Deep Sea*, 883 F. Supp. at 1354. The court further held that "[t]he State's assertion that any abandoned personal property and uninsured cargo automatically becomes the property of the State is incorrect." *Id.*

The district court, thus, did not address the issue of whether, under the ASA, when claims were paid on only a fraction of a ship's cargo, an inference of abandonment arises with respect to the uninsured vessel and remaining cargo. This is a question of first impression.

The State would have us divide the wreck into the portion on which claims were paid (which would not be considered abandoned) and the portion that was uninsured (which would be considered abandoned). If we were to adopt this approach, we would have to dismiss the action in federal court with respect to the abandoned part of the wreck and retain jurisdiction over the part on which insurance claims were paid.

We decline to divide the wreck of the *Brother Jonathan* into abandoned and unabandoned portions for the purposes of the ASA for two reasons. First, if we were to find that the vessel had been partially abandoned, both the federal court and the state court would be adjudicating the fate of the *Brother Jonathan*. It is unlikely that Congress intended such a confusing and inefficient approach in adopting the ASA.

Second, such an approach is inconsistent with the general rule in maritime law of treating wrecks as a legally unified *res*. In fact, the Fourth Circuit's decision in *Columbus-America* appears to be the only admiralty case in which a wreck has not been treated as a unified whole. 974 F.2d at 465. There, the court held that a number of insurance companies retained title to parts of the wreck and remanded to the district court for a determination of how the wreck would be apportioned among them. *Id.* at 468.

Having concluded that the *Brother Jonathan* should be treated as a unified *res*, the question remains, should the wreck be considered abandoned (because the vessel and much of its cargo were not insured) or should the vessel be considered not to have been abandoned (because part of the cargo was insured)? Because the law is reluctant to find abandonment, *see, e.g.*, *Lady Elgin*, 755 F. Supp. at 217, and because a finding of partial abandonment would deprive those holding title to the unabandoned portion of the wreck access to the federal forum, we hold that the *Brother Jonathan* was not abandoned. We reserve the question of whether there is some point at which the portion of the wreck that is insured becomes so negligible that the wreck might be considered abandoned for the purposes of the ASA.

III. *Conclusion*

Because we find that the *Brother Jonathan* was not abandoned and that therefore, it does not fall under the ASA, we need not reach the State's argument that the district court erred in finding that the *Brother Jonathan* was not embedded. Even if the district court erroneously excluded the audio portion of a tape that suggested that the *Brother Jonathan* was embedded, the error was harmless. Nor need we address the question of whether we should take judicial notice of evidence that on October 12, 1995, the *Brother Jonathan* was determined eligible for inclusion in the National Register. Finally, because we find that the ASA does not apply, we do not reach the constitutionality of that statute. We therefore hold that the district court properly denied the state's motion to dismiss on the grounds of Eleventh Amendment immunity.

We AFFIRM.

APPENDIX B

In the United States District Court
for the Northern District of California

No. C 91-3899 LCB

Deep Sea Research, Inc.,
Plaintiff,

v.

The Brother Jonathan, her
appurtenances, furniture, cargo, etc.,
Defendant,

and

State of California, State Lands Commission,
and the United States of America,
Intervening Defendants.

[Filed March 16, 1995]

MEMORANDUM AND ORDER

BECHTLE, J.

Presently before the court is the restricted appearance and motion of intervening defendant, the State of California, State Lands Commission ("State"), to dismiss plaintiff Deep Sea Research, Inc.'s ("DSR") admiralty *in rem* action against defendant, the wreck of the *S.S. Brother Jonathan*, her appurtenances, furniture and cargo (collectively "*Brother Jonathan*"), for lack of subject matter jurisdiction. Also before the court is DSR's motion for a warrant for arrest of the *Brother Jonathan* pursuant to Supplemental Admiralty and Maritime Claims Rule, C(3), and for a court order appointing DSR exclusive salvor of the vessel. For the reasons set forth below, the State's motion will be denied and DSR's motion will be granted.

I. *BACKGROUND*

A. *Factual History*

The *Brother Jonathan* is a 220 foot wooden-hulled, double side-wheeled steamship which was built in the middle of the last century. (Flohr Decl. at ¶ 4.) The vessel, which was owned by the California Steam Navigation Company, left San Francisco on Friday, July 28, 1865, bound for Portland, Oregon and Vancouver. (Ex. C-1.) On board at the time were 109 passengers and 54 crew. (*Id.*) On Sunday, July 30, 1865, the *Brother Jonathan* struck a submerged rock and sank off the coast of Northern California in the vicinity of Crescent City. (*Id.*) The ship went down in less than one hour, and only 16 persons survived. (*Id.*)

When the ship sank, it was allegedly carrying valuable cargo, including a shipment of gold coin and bullion. (Flohr Decl. at ¶ 4.) Shortly after the *Brother Jonathan* sank, the San Francisco offices of five insurance companies paid claims totalling $48,490.00 for the loss of the vessel. (Ex. C-1.) It was estimated at the time, however, that approximately two-thirds of the ship's cargo was uninsured. (*Id.*)

More than 128 years later, in October of 1993, DSR located the wreck of the *Brother Jonathan* approximately four and one-half miles off the coast of Crescent City, California. (Flohr Decl. at ¶ 5; Siverts Decl. at ¶ 7.) The ship is resting upright on the sea floor in approximately 250 feet of water. (Siverts Decl. at ¶ 7.) A videotape taken of the wreck from a manned submersible confirms that the *Brother Jonathan* is largely intact—at least three-quarters of the ship's hull, and all of its surviving superstructure, floors, galley, cabins and other portions of the vessel, are clearly visible above the surface of the ocean floor.[1] (DSR Mot. for Issuance of Warrant of

1. The video portion of the tape was admitted into evidence at a hearing before the court on September 27, 1994. (Tr. 9/27/96 at 34-37, 39.) The audio portion of the tape, however, was ruled inadmissible. (*Id.*)

Arrest, Ex. B.) In addition, portions of the vessel's cargo, including dishware, are clearly visible resting on the sea floor. (*Id.*)

B. *Procedural History*

1. *DSR's Admiralty In Rem Action*

DSR has recovered several artifacts from the *Brother Jonathan*, including: two pieces of china; a corked, full champagne bottle; a medicine bottle; an ale bottle; and a brass spike from the ship's hull. (Flohr. Decl. at ¶ 6.) Based on DSR's possession of these items, on April 1, 1994, DSR filed an admiralty *in rem* action stating a maritime claim against the wreck of the *Brother Jonathan* under Federal Rule of Civil Procedure 9(h) and 28 U.S.C. § 1333. DSR is seeking an award of title to the ship and its cargo under the common law of finds or, alternatively, to a salvage award under the common law of salvage. DSR also asserts a right of ownership by purchase of subrogation interests from the insurers of the vessel's original owner. At this time, however, DSR is seeking only a warrant for arrest of the *Brother Jonathan* pursuant to Supplemental Admiralty and Maritime Claims Rule, C(3), and a court order appointing DSR exclusive salvor of the vessel.

2. *The State's Motion to Dismiss*

On April 1, 1994, the State filed a restricted appearance and motion to dismiss DSR's *in rem* complaint for lack of subject matter jurisdiction. The State asserts that it has title to the *Brother Jonathan* under the Abandoned Shipwreck Act of 1987 ("ASA" or "Act"), 43 U.S.C. § 2101, *et seq.*, which gives states title to all abandoned shipwrecks which are embedded in their submerged lands, and all abandoned shipwrecks which are not embedded in the submerged lands of the state but are eligible for inclusion in the National Register of Historic Places ("National Register"). As an independent

ground for ownership of the *Brother Jonathan*, the State asserts that it has title to the shipwreck under California Public Resources Code § 6313(a), which declares that the State has title to all abandoned shipwrecks, archaeological sites and historic resources resting on or in the submerged lands of the State. The State argues that the court lacks subject matter jurisdiction to proceed with this matter because the State has a "colorable claim" of ownership to the *Brother Jonathan*, therefore, DSR's *in rem* action against the vessel is really an action against the State which is prohibited by the Eleventh Amendment to the United States Constitution.

DSR vigorously disputes the State's argument that it holds title to the *Brother Jonathan* under state and federal law, and that the court lacks jurisdiction to adjudicate the merits of DSR's claim because of the Eleventh Amendment. DSR maintains that the State does not have a colorable claim to the *Brother Jonathan* because: (1) California Public Resources Code § 6313 is preempted by federal admiralty law and the ASA; (2) the State does not hold title to the *Brother Jonathan* under the ASA because the *Brother Jonathan* is neither "abandoned" nor "embedded" within the meaning of the Act, and the Secretary of the Interior has not made a written determination that the *Brother Jonathan* is eligible for listing in the National Register; and (3) even if the *Brother Jonathan* is part of the class of shipwrecks protected by the ASA, the ASA is unconstitutional because it impermissibly divests the federal courts of their exclusive jurisdiction in admiralty and maritime matters pursuant to Article III, section 2, of the United States Constitution and 28 U.S.C. § 1333, and the ASA destroys the uniform application of admiralty law and maritime jurisdiction throughout the whole of the United States.[2]

The court held two hearings, on September 9, 1994 and

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2. After DSR challenged the constitutionality of the ASA, the United States intervened for the sole purpose of supporting the constitutionality of the Act.

September 27, 1994, to determine whether it had jurisdiction to proceed in this matter.[3] The first hearing focused on whether the *Brother Jonathan* was located within California's territorial sea.[4] During the second hearing, the State presented evidence in support of its claim that the *Brother Jonathan* is an abandoned shipwreck embedded in the submerged lands of the State. The State also presented testimony regarding the ship's eligibility for listing in the National Register.

Based on the evidence of record, and for the reasons set forth below, the court finds that the State has failed to demonstrate that it has a "colorable claim" to the *Brother Jonathan* under the ASA. The court also finds that California Public Resources Code § 6313 is preempted by § 7 of the ASA, which declares "[t]his chapter shall not change the laws of the United States relating to shipwrecks, other than those to which this chapter applies." 43 U.S.C. § 2106(b). Consequently, the law of admiralty applies to this action and the State's motion to dismiss will be denied.

II. *DISCUSSION*

As a preliminary matter, the parties vigorously dispute the

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3. The purpose of the two hearings was not to determine the merits of any party's claim to the *Brother Jonathan*, it was simply to determine whether the ASA and California Public Resources Code § 6313 apply to the *Brother Jonathan*. (Tr. 9/9/94 at 10.) If the statutes applied, then the State would have a "colorable claim" to the *Brother Jonathan* and the court would be divested of jurisdiction. *See Marx v. Government of Guam*, 866 F.2d 294 (9th Cir. 1989); *Zych v. Wrecked Vessel believed to be the Lady Elgin*, 960 F.2d 665, 670 (7th Cir.), *cert. denied*, 113 S.Ct. 491 (1992) ("it is the existence, and not the strength, of the claim that activates the eleventh amendment."). Conversely, if the statutes did not apply, the court would retain jurisdiction to apply the laws of admiralty. 43 U.S.C. § 2106(b).

4. DSR has not disclosed the exact location of the *Brother Jonathan*. For the purpose of deciding the State's motion to dismiss, DSR has stipulated that the *Brother Jonathan* is located within California's territorial sea. (Tr. 9/27/94 at 3.)

meaning of the term "colorable claim," and the evidentiary support necessary for the State to demonstrate the existence of a "colorable claim."[5] Since none of the circuits have squarely addressed this issue in a case with similar facts, the court will first attempt to identify the elements of a "colorable claim." The court will then address the applicability of the ASA and its effect on the California Public Resources Code. Finally, the court will address DSR's motion for issuance of a warrant of arrest and motion to be declared exclusive salvor of the vessel.

A. *What is a "Colorable Claim"?*

The State, citing *Marx*, contends that its mere utterance of a claim to the *Brother Jonathan* under state or federal law makes it "colorable," and that the State need not prove that the laws actually apply to the vessel before the district court is divested of jurisdiction. The State is incorrect. First, the Ninth Circuit made no such holding in *Marx*, in which the parties' dispute arose before the effective date of the ASA, and the court refused to apply the terms of the new Act. *See Marx*, 866 F.2d at 295, 300. Second, the Ninth Circuit's more recent holding in *ITSI TV Productions v. Agricultural*

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5. In the context of shipwreck litigation, the term "colorable claim" is derived from Justice Stevens' comment in *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982), that state officials named in a warrant of arrest for certain artifacts recovered from a 17th-century Spanish treasure ship acted without legitimate authority in withholding the property of the ship's salvors. After examining the basis of the state officials' arguments for retaining possession of the artifacts, and rejecting the State of Florida's argument that the Eleventh Amendment barred the execution of the warrant, Justice Stevens stated: "Thus, since the state officials do not have a *colorable claim* to possession of the artifacts, they may not invoke the Eleventh Amendment to block execution of the warrant of arrest." *Treasure Salvors*, 458 U.S. at 697 (emphasis added). Since *Treasure Salvors*, the term "colorable claim" has often been quoted out of context in shipwreck litigation, but it has never been defined.

Assoc., 3 F.3d 1289 (9th Cir. 1993), makes it clear that a party asserting sovereign immunity will have to at least prove, by a preponderance of the evidence, that the privilege applies. *See ITSI*, 3 F.3d at 1291–92 ("Like any other defense, that which is promised by the Eleventh Amendment must be proved by the party that asserts it and would benefit from its acceptance.") *See also Treasure Salvors*, 458 U.S. at 683–99 (where the Supreme Court first examined, and then rejected, state's claim of sovereign immunity); *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to SB "Seabird"*, 941 F.2d 525 (7th Cir. 1991) (remanding case to District Court to determine whether shipwreck was "embedded" and applicability of ASA). Thus, to establish the *existence* of a claim, the State must establish, by a preponderance of the evidence, that the ASA applies to the vessel at issue.[6] Once the existence of a "colorable claim" is established, the district court lacks jurisdiction to adjudicate the merits of the State's claim and the action must be dismissed. *Treasure Salvors*, 458 U.S. at 699–700

To establish the existence of a "colorable claim" to a shipwreck under the ASA, the State, as the moving party, must demonstrate that the vessel is abandoned and embedded in the subsurface or coralline formations of the territorial waters of the State. *Seabird*, 941 F.2d at 530. If the shipwreck is abandoned but not embedded in the submerged lands of the

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6. This is especially true in cases where, as here, the federal courts retain exclusive jurisdiction to determine the controversy at issue. In this case, it is exclusively within the federal court's jurisdiction to determine whether the ASA applies, and whether a party has title to a shipwreck that has not been abandoned under the laws of admiralty. *See* 28 U.S.C. ¶ 1333. If the court were to adopt the State's argument that the mere utterance of a claim makes it "colorable," and that the State has no burden of proving that the ASA applies, the plaintiff would be left without an adequate remedy at law. State courts simply do not have the jurisdiction to determine whether the ASA applies to a particular shipwreck, nor do they have jurisdiction to apply the laws of admiralty to competing claims of title.

State, the State must demonstrate that the Secretary of the Interior has included the shipwreck in, or has made a written determination that the shipwreck is eligible for listing in, the National Register.[7] *Id.* Once the State establishes that the ASA applies to an abandoned shipwreck, the federal court is divested of jurisdiction pursuant to 43 U.S.C. § 2106(a), and the question of title is settled by 43 U.S.C. § 2105(a) and (c). If a State alleges that it has a "colorable claim" to a shipwreck under state law, the State must demonstrate whether, and to what extent, its law regarding shipwrecks co-exists with, or is preempted by, the ASA. *See* 43 U.S.C. §§ 2103 and 2106(b). If both the ASA and state law are inapplicable, the federal court is not divested of jurisdiction, and it may properly turn its attention to the merits of the plaintiff's claim in accordance with the laws of admiralty. *See* 43 U.S.C. § 2106(b).

B. *The Abandoned Shipwreck Act of 1987*

On December 19, 1987, Congress enacted the ASA "to vest title to certain abandoned historic shipwrecks that are buried in State lands to the respective States and to clarify the management authority of the States for these abandoned historic shipwrecks." Pub. L. 100–298, 1988 U.S. Code Cong. and Adm. News at 365–385. Prior to the enactment of the ASA, tremendous confusion had arisen regarding whether states

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7. The United States has encouraged the court to resolve the factual issues to determine the applicability of the ASA. In the memorandum that the United States filed in support of the constitutionality of the ASA, the government states:

> Several key factual issues must be resolved in order to determine whether the ASA even applies to THE BROTHER JONATHAN. DSR and the state disagree, for example, about whether THE BROTHER JONATHAN is within state territorial waters, whether it is embedded, and whether its original owners and successors in interest have abandoned it. Until these issues are resolved, it will not be clear whether the ASA applies to this shipwreck.

(United States Memo. at 6.)

owned and had the authority to manage abandoned shipwrecks located in their territorial waters. *Id.* at 366.

In 1953, Congress enacted the Submerged Lands Act ("SLA"), 43 U.S.C. § 1301, *et seq.*, which gave states title to the natural resources located within three miles of their coastline. *Id.* With the growing popularity of SCUBA diving, and advances in underwater technology, there was a corresponding increase in the discovery of ancient shipwrecks off the coast of the United States. Many of these newly discovered shipwrecks were both historically significant and financially valuable. With the increased discovery of shipwrecks came increased controversy over whether the state upon whose land the shipwreck was located owned the vessel, or whether the individual who discovered the shipwreck obtained title to the vessel under the traditional laws of admiralty.

Between 1953 and 1987, at least 27 states enacted legislation asserting title to, and authority over, shipwrecks located in their territorial waters under authority allegedly granted to the states by the SLA. *Id.* The SLA, however, did not specifically include abandoned shipwrecks in its definition of "natural resources."[8] *Id.* When states attempted to assert title to shipwrecks claimed by salvors, a majority of the federal courts that considered the issue found: (1) the SLA did not specifically assert title to shipwrecks on behalf of the United States and then transfer that title to the states; and (2) state laws regarding shipwrecks whose provisions were inconsistent with federal common law admiralty principles were superseded by those principles under the Supremacy Clause of the Constitution. *Id.* at 366, 371 (*citing Cobb Coin Co. Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186 (S.D. Fla. 1981); *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*,

8. Under the SLA, the term "natural resources" includes oil, gas, and all other minerals, as well as marine animal and plant life.

569 F.2d 330 (5th Cir. 1978)). After lobbying by the states, Congress enacted the ASA to eliminate the confusion generated by the controversy. (State Memo. in Support of Restricted Appearance and Mot. to Dismiss at 7.)

Under § 6(a) of the ASA, the United States asserts title to three classes of shipwrecks: (1) abandoned shipwrecks that are embedded in the submerged lands of a state; (2) abandoned shipwrecks that are embedded in coralline formations protected by a state on its submerged lands; and (3) abandoned shipwrecks that are not embedded, but are located on the submerged lands of a state and are included in or determined to be eligible for inclusion in the National Register. 43 U.S.C. § 2105(a). Under § 6(b), the United States has transferred title to these shipwrecks to the states in or on whose submerged lands the shipwreck is located. 43 U.S.C. § 2105(c). Section 7(a) of the ASA specifically excludes these three classes of shipwrecks from the law of salvage and the law of finds, the two areas of maritime law traditionally applied by potential salvors to obtain title to shipwrecks. 43 U.S.C. § 2106(a). Section 7(b), however, expressly states that the ASA "shall not change the laws of the United States relating to shipwrecks, other than those to which [the Act] applies." 43 U.S.C. § 2106(b). Therefore, any shipwrecks that do not fit within the three classes of shipwrecks covered by § 6(a) remain subject to the traditional principles of admiralty law, and the federal courts retain exclusive jurisdiction to apply the laws of admiralty to these shipwrecks.

1. *The Brother Jonathan Is Not "Abandoned"*

The ASA, by its terms, applies only to "certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention." 43 U.S.C. § 2101(b). The Act itself does not define the term "abandoned;" however, according to the regulations promulgated under the ASA, the term "abandoned shipwreck" means "any shipwreck to which title voluntarily has been given up by

the owner with the intent of never claiming a right or interest in the future and without vesting ownership in any other person." 55 Fed. Reg. 50116, 50120 (Dec. 4, 1990). In addition, the regulations specifically exclude from the definition of "abandoned shipwrecks" vessels upon which insurance claims have been paid:

> When the owner of a sunken vessel is paid the full value of the vessel (such as receiving payment from an insurance underwriter) the shipwreck is not considered to be abandoned. In such cases, title to the wrecked vessel is passed to the party who paid the owner.

Id. at 50120-50121.

The ASA's definition of "abandonment" generally follows established property law. It is well-settled, for instance, that abandonment is the voluntary relinquishment of one's right to property. *Mucha v. King* , 792 F.2d 602, 610 (7th Cir. 1986). Abandonment occurs "by an express or implied act of leaving or deserting property without hope of recovering it and without the intention of returning to it." 3A M. Norris, *Benedict on Admiralty* § 134 (7th ed. 1993). Additionally, it has long been the law that "[w]hen articles are lost at sea the title of the owner in them remains." *Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 461 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1625 (1993). Once an article has been lost at sea, "lapse of time and nonuser are not sufficient, in and of themselves, to constitute an abandonment." *Id.* (citations omitted). "In addition, there is no abandonment when one discovers sunken property and then, even after extensive efforts, is unable to locate its owner." *Id.* (citations omitted). To show abandonment, a party must prove: (1) an intent by the original owner to abandon his property; and (2) physical acts carrying that intent into effect. *Id.* at 461, 464–65. The act of abandonment "must be proved by a clear and unmistakable affirmative act to indicate a purpose to repudiate ownership." *Id.* at 461

(citation omitted). Finally, the finding of abandonment must be supported by strong and convincing evidence. *Id.*

In this case, the State contends that the *Brother Jonathan* is abandoned because the vessel's owners have not attempted to salvage the vessel since 1865. On the other hand, DSR maintains that the *Brother Jonathan* is not abandoned because there has never been an affirmative act of abandonment on the part of the vessel's owners, and the technology did not exist to either find or safely salvage the vessel until recently. DSR also maintains that insurance claims were paid on the vessel in 1865; therefore, the insurers obtained title to the vessel through rights of subrogation. DSR asserts that it now holds title to the *Brother Jonathan* because the successors in interest to two of the vessel's original insurers have assigned their subrogation interests to DSR.

The only evidence that the State has presented on the issue of abandonment is the testimony of Rand Frank Herbert ("Herbert"), an historian, regarding the factual circumstances of the *Brother Jonathan's* sinking and the results of his research regarding salvage efforts and insurance claims paid for the loss of the vessel. (Herbert, Tr. 9/27/94 at 6.) During the September 27, 1994 hearing, Herbert testified, erroneously, that the *Brother Jonathan* was carrying between 200 and 225 passengers and 50 crew when it sank, and that 19 persons survived.[9] (*Id.* at 10–11.) Herbert also testified that he was unable to locate any reference to salvage efforts undertaken by the ship's owners, but he did find references to other salvage

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9. During Herbert's direct testimony, the State offered Exhibit C-1 into evidence without objection. (Herbert, Tr. 9/27/94 at 17.) Exhibit C-1 is a copy of a newspaper article from the August 2, 1865 edition of the San Francisco Bulletin. The article describes the circumstances surrounding the sinking of the *Brother Jonathan*, and it provides a list of the ship's 109 passengers and 54 crew. (Ex. C-1.) The article also lists insurance claim paid by five underwriters for the loss of the vessel. (*Id.*) It also states, without any additional explanation, that "[p]robably two-thirds of the cargo was uninsured." (*Id.*)

attempts. (*Id.* at 12–14, 17–18.) Finally, Herbert testified that, although he found evidence that insurance claims were paid for the loss of the vessel, he was unable to determine from his research which portion of the ship or its cargo was covered by insurance. (*Id.* at 15–17.)

During cross-examination, Herbert admitted that he was retained by the State just eight days before the *second* hearing, despite the fact that the State had more than five months to prepare for the court's hearing on its motion to dismiss. (*Id.* at 21.) Herbert testified that he conducted just 22 hours research, which consisted almost entirely of reviewing newspaper articles during three visits to the library. (*Id.* at 21–22, 23.) He admitted that he did not research any insurance records, nor did he attempt to contact any of the underwriters who paid claims for the loss of the *Brother Jonathan*. (*Id.* at 23–24, 26.) More importantly, Herbert admitted that he did not find any evidence that the owner of the *Brother Jonathan*, or the insurance underwriters, had publicly disclaimed any further ownership interest in the vessel. (*Id.* at 22.)

Herbert's testimony, by itself, does not provide a sufficient basis for the court to conclude that the owners of the *Brother Jonathan* have taken a "clear and unmistakable affirmative act to indicate a purpose to repudiate ownership" in the *Brother Jonathan*, or its cargo. In addition, the State has failed to provide sufficient evidence to demonstrate that the *Brother Jonathan* has been abandoned due to the lapse of time, or because the owners of the vessel have failed to undertake salvage efforts.

The facts of this case are similar to two recent cases where courts have been called upon to decide the issues of abandonment and competing claims of ownership in the era of insurance: *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 742 F. Supp. 1327 (E.D. Va. 1990), *rev'd*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1625 (1993); and *Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be SB "Lady Elgin"*, 755 F. Supp. 213 (N.D. Ill. 1991), *rev'd on other grounds*, 960 F.2d 665 (7th

Cir. 1992).

In *Columbus-America*, a consortium of insurance companies filed competing claims of ownership against a salvor who discovered the *S.S. Central America*, a wooden-hulled, side-wheeled steamship which sank 160 miles off the coast of South Carolina in 1857. The District Court held that the successors in interest to the original insurance companies who paid claims for the loss of the vessel obtained ownership interests in the *S.S. Central America* and its cargo by right of subrogation, but the insurance companies affirmatively abandoned their ownership interests by failing to undertake salvage efforts and deliberately destroying certain documentation. 742 F. Supp. at 1343–48. Applying the common law of finds, the court held that the salvor was entitled to, and vested with, ownership of all of the cargo and artifacts recovered from the *S.S. Central America*. *Id.* at 1348.

On appeal, however, the Fourth Circuit held that the insurers' abandonment could not be presumed due to inaction because it was not technologically feasible to salvage the vessel until recently. 974 F.2d at 461–68. The appellate court found that the law of finds is properly applied in situations where the previous owners are found to have abandoned their property, but such abandonment must be proven by clear and convincing evidence, such as an owner's express declaration that he is abandoning title.[10] *Id.* at 464. The Fourth Circuit held that the District Court erred when it found an abandonment and applied the law of finds. *Id.* at 468. Therefore, the

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10. The Fourth Circuit stated:

> Should the property encompass an ancient and long lost shipwreck, a court may infer an abandonment. Such an inference would be improper, though, should a previous owner appear and assert his ownership interest; in such a case the normal presumption would apply and an abandonment would have to be proved by strong and convincing evidence.

Id. at 464–65.

Fourth Circuit remanded the case to the District Court with instructions to hold a trial to determine the value of the cargo insured by each underwriter, and to determine the proper salvage award for the plaintiff. *Id.*

In the *Lady Elgin* case, two parties asserted competing claims to the wreck of the *Lady Elgin*, a 300-foot side-wheeled steamship which sank in Lake Michigan in 1860. The finder of the *Lady Elgin* asserted title to the vessel under the law of finds, arguing that the underwriter who originally paid claims for the loss of the *Lady Elgin* effectively abandoned the vessel through the lapse of time and by its failure to take any steps to recover the vessel. At the same time, a charitable foundation that obtained an ownership interest in the *Lady Elgin* from the successor to the original insurance underwriter disputed the salvor's claim that the ship was abandoned, arguing that the original underwriter instructed its agents not to abandon the vessel, and, therefore, never intentionally surrendered its interest as subrogee of the vessel's owner. The District Court agreed with the foundation, finding that the underwriter's documents showed a specific intent not to abandon the vessel, and that the underwriter's failure to attempt salvage efforts was excusable because the technology did not exist to recover the wreck until the late 1980s. 755 F. Supp. at 217. The court stated:

> In light . . . of the law's hesitancy to find abandonment and the concomitant requirement that abandonment be supported by strong and convincing evidence, the Court finds that [the underwriter] was not required to engage in efforts to recover the wreck in order to avoid abandoning its interest when such efforts would have had minimal chances for success.[11]

Id.

In this case, the state of the art technology necessary to accurately locate the *Brother Jonathan*, or to safely salvage the vessel at a depth of 250 feet, did not exist until just recently. (Jackson Decl. at ¶¶ 4–5; Groom Decl. at ¶¶ 4–5.) Within the last three years, advances in sonar technology have made it possible to locate shipwrecks in deep water with greater precision, and for less money than with the technology that was previously available. (Groom Decl. at ¶¶ 4–5.) Also within the last three years, scientific advances in the use of mixed breathing gasses to combat decompression sickness have increased the safety factor in diving at great depths. (Jackson Decl. at ¶¶ 4–5.) As in the *Columbus-America* and *Lady Elgin* cases, the owners of the *Brother Jonathan* and its cargo were not required to engage in efforts to recover the wreck in order to avoid abandoning their interests when such efforts would have had minimal chances for success. The mere fact that the owners of the *Brother Jonathan* have not undertaken salvage efforts, if it is true, does not provide sufficient evidence for the court to conclude that the *Brother Jonathan* has been legally abandoned.

As an alternative theory of abandonment, the State argues that, because a newspaper article published in 1865 stated "[p]robably two-thirds of the cargo was uninsured," and the owners of the uninsured cargo have not come forward to date, the uninsured portion of the *Brother Jonathan's* cargo has been abandoned due to the lapse of time. The State also

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11. On appeal, the Seventh Circuit agreed with the District Court's finding regarding abandonment. The Seventh Circuit, however, reversed the District Court's later decision to issue an injunction against "all-the-world," holding that the injunction potentially was a judgment against the State of Illinois in violation of the Eleventh Amendment. *Lady Elgin*, 960 F.2d at 670.

asserts that the personal property of the passengers and crew has been abandoned for the same reason. The State claims an ownership interest in the uninsured cargo and personal property under California Public Resources Code § 6313.

While the State is correct in its assertion that the court may infer abandonment of cargo and personal property if an owner fails to appear in court, at this time, based on the showing that the State has made, it would be premature for the court to find that any individual items of cargo or personal property have been abandoned. At this stage in the litigation, DSR is not asking the court to award it salvage fees from the *res* of the wreck, or to otherwise make any order regarding title to or distribution of the wreck or its contents. (DSR Memo. of Points and Authorities in Support of Mot. for Issuance of Warrant of Arrest at 3, n. 2.) DSR is currently seeking only a warrant for arrest of the vessel and an order appointing DSR custodian of the wreck. (*Id.*) DSR has suggested that any final determination regarding title should be made after the salvage operation is completed. (*Id.*) The court agrees that this is the most prudent way to proceed with the case at this time. To date, there has been very little publicity generated by the discovery of the *Brother Jonathan*, and only a few artifacts have been recovered. Upon the issuance of a warrant for arrest of the vessel, DSR will be required to publish notice of this action and the arrest in a newspaper of general circulation. *See* Supplemental Admiralty and Maritime Claims Rule, C(4). In addition, any future salvage operations will undoubtedly generate additional publicity, and it is likely that this publicity will cause additional claimants to come forward.[12]

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12. At this stage in the litigation, only DSR and the State have asserted claims to the *Brother Jonathan*. In other shipwreck cases, and especially in cases where vessels carried valuable cargo or were lost during the era of insurance, additional parties have intervened in federal court to assert competing claims to the wreck. *See, infra, Columbus-America* (competing claims asserted by consortium of insurance underwriters, heir to Miller Brewing fortune, Texas millionaire, Ivy League university, and

At this time, the State has failed to demonstrate that it has a colorable claim to any cargo or personal property which ultimately may be found to be abandoned. The State's assertion that any abandoned personal property and uninsured cargo automatically becomes the property of the State is incorrect. As is discussed in Section II.B.4., *infra*, § 6313 is preempted by the ASA. More importantly, the ASA does not support the State's theory that the State obtains title to an entire shipwreck if a portion of its contents are found to be abandoned, but the entire ship is not otherwise abandoned and embedded.[13] The State does not cite to any case law to support its argument, and the court is not aware of any if it exists. In fact, in another case with similar facts, the State of Florida's argument that it could declare title to abandoned property under the sea through legislative pronouncement was rejected by the court. *See Cobb Coin*, 525 F. Supp. at 198, 215-16.

In sum, after considering all of the evidence, the court finds that the State has failed to produce sufficient evidence to demonstrate that the *Brother Jonathan* is legally abandoned.

2. *The Brother Jonathan Is Not "Embedded"*

The second class of shipwrecks protected by the ASA are abandoned shipwrecks that are embedded in either the submerged lands of a state, or in coralline formations that are

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Order of Catholic monks) and *Lady Elgin* (competing claim asserted by a charitable foundation that obtained insurance underwriter's subrogation interest). DSR already has obtained the subrogation interests of two insurance companies; therefore, it should be shielded from claims from these potential claimants. However, due to the *Brother Jonathan's* proximity to shore, its notoriety, the purported value of its cargo, and the relatively recent date of its sinking, DSR could potentially face competing claims from the heirs of those lost at sea and from competing salvors.

13. Under the ASA, the term "shipwreck" means any vessel or wreck, its cargo, and other contents. 43 U.S.C. § 2102(d). The ASA, however, does not provide for the apportionment of a ship's contents.

protected by the state.[14] 43 U.S.C. § 2105(a). The ASA defines the term "embedded" as:

> firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof[.]

43 U.S.C. § 2102(a).

According to the regulations promulgated under the ASA:

> Tools of excavation would include, but would not be limited to, hydraulic, pneumatic, or mechanical dredges; explosives; propeller wash deflectors; air lifts; blowtorches; induction equipment; and mechanical tools used to remove or displace bottom sediments or coralline formations to gain access to shipwrecks.

55 Fed. Reg. at 50121.

During the September 27, 1994 hearing, the State presented the testimony of John W. Foster ("Foster"), the senior archaeologist for the California Department of Parks and Recreation, on the issue of whether the *Brother Jonathan* is embedded. Foster testified that, based solely on his observation of DSR's videotape of the wreck, he believes the *Brother Jonathan* is embedded in the sea floor. (Foster Tr. 9/27/94 at 39–40.) Foster testified that the hull of the *Brother Jonathan* is buried up to the level of the vessel's copper sheathing, which formerly extended to the waterline of the ship, and is now visible above the sea floor. (*Id.* at 40.) According to Foster, this indicates that "a significant amount of the hull is actually buried in the seabed itself." (*Id.*)

During cross-examination, however, Foster admitted that a

14. In this case, the State does not allege that the *Brother Jonathan* is embedded in coralline formations protected by the State. Therefore, the court will confine its analysis to whether the State has demonstrated that the *Brother Jonathan* is embedded in the submerged lands of the State.

substantial portion of the *Brother Jonathan* is located above the ocean floor. (*Id.* at 42.) He also admitted that the superstructure of the wreck is covered only by a fine layer of silt which can be easily removed by the wave of a diver's hand. (*Id.*) Finally, Foster admitted that he does not know anything about the consistency of the sea floor in the area of the *Brother Jonathan*, or whether the vessel is resting on loose or hard sediment. (*Id.* at 42–43.)

Foster's testimony, by itself, is insufficient to establish that tools of excavation are *required* to gain access to the wreck. In fact, the weight of the evidence does not support Foster's brief testimony on this issue. For instance, an examination of DSR's videotape reveals that the *Brother Jonathan* is not embedded in the sea floor. (*See* DSR Mot. for Issuance of Warrant of Arrest, Ex. B; Siverts Decl. at ¶ 8; Bascom Decl. at ¶ 4; Slater Decl. at ¶ 5.) In fact, when the videotape is viewed in its entirety, it appears that the *Brother Jonathan* has merely settled on to the sea floor.[15] (DSR Mot. for Issuance of Warrant of Arrest, Ex. B.) At least three-quarters of the ship's hull, including all of its surviving superstructure, floors, galley, cabins and other portions of the vessel, are clearly visible above the surface of the ocean floor. (*Id.*) A large section of the vessel's copper sheathing also can be seen waving in the current. (*Id.*) Additionally, large portions of the ship's cargo, including dishware, are clearly visible resting on the sea floor. (*Id.*)

Moreover, according to Don Siverts ("Siverts"), the underwater surveyor who videotaped this shipwreck, the *Brother Jonathan* is not embedded in the ocean floor. (Siverts Decl. at ¶ 8.) In a declaration dated April 20, 1994, Siverts states that the lower portions of the ship's hull are not visible on the

15. Any 220 foot wooden vessel weighing several hundred tons will inevitably settle into the bottom after 128 years. Settling into the bottom, however, does not mean that the vessel is wholly or even partially embedded such that tools of excavation are required to gain access to the wreck.

videotape because they appear to have deteriorated and collapsed, and are now resting on top of the ocean floor. (*Id.*) Siverts also states that while videotaping the *Brother Jonathan*, he "saw down into the hull, and the interior of the vessel did not appear to contain any significant amount of sand, mud, or dirt." (*Id.* at ¶ 9.) Finally, Siverts declared that although the aft section of the *Brother Jonathan* was covered by a layer of sediment during the time that he observed it, the sediment was only one or two inches deep, it was fine, loose and powdery, and it could be easily displaced by a human hand.[16] (*Id.* at ¶ 10.)

After examining all of the evidence, the court finds that the State has failed to demonstrate by a preponderance of the evidence that the *Brother Jonathan* is firmly affixed in the submerged lands of the State such that tools of excavation are required to move the bottom sediments to gain access to the ship or its cargo. Thus, the State has failed to demonstrate that the *Brother Jonathan* is "embedded" as defined by the ASA.

3. *The Brother Jonathan Has Not Been Determined to be Eligible for Listing in the National Register*

The third class of shipwrecks covered by the ASA are abandoned shipwrecks that are not embedded, but are located on the submerged lands of a state and are included in or determined to be eligible for inclusion in the National Register. 43 U.S.C. § 2105(a). In this case, the *Brother Jonathan* is located on the submerged lands of the State of California but it has not been included in or determined to be eligible for inclusion in the National Register.

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16. Siverts' declaration is further supported by the declarations of Willard Bascom and Richard Slater, both of whom testified that, after examining the videotape of the wreck, they believed that tools of excavation are not required to gain access to the wreck. (Bascom Decl. at ¶ 4; Slater Decl. at ¶ 5.)

According to the regulations promulgated under the ASA, "in order for the United States to assert title to any abandoned shipwreck, the shipwreck must be listed in or determined eligible by the Secretary of the Interior for listing in the National Register." 55 Fed. Reg. at 50121, n. 2. When a question exists as to the historical significance of a shipwreck that is not included in or determined to be eligible for inclusion in the National Register, any person may make a request to the Secretary of the Interior for a written determination of the shipwreck's eligibility for inclusion in the National Register. *Id.* at 50121. Once a request for a determination of historical significance has been made, the Secretary of the Interior will determine whether the particular shipwreck meets the criteria for eligibility set forth in 36 C.F.R. § 60.4. *Id.*

In this case, the State has never requested that the Secretary of the Interior determine the historical significance of the *Brother Jonathan*. (Herbert, Tr. 9/27/94 at 24–25; Foster, Tr. 9/27/94 at 43–44, 46.) During the September 27, 1994 hearing, Foster, the State's marine archaeologist, testified that the State conducted some historical research on the *Brother Jonathan* in 1983, but it has not done anything else since then.[17] (Foster, Tr. 9/27/94 at 43–44.) According to Foster, the State has not requested a determination of the *Brother Jonathan's* historical significance because the State has not

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17. The State did not present any documentary evidence at the September 27, 1994 hearing to support its claim that the *Brother Jonathan* is eligible for listing in the National Register. While the State's expert witness testified that he believed the *Brother Jonathan* had the "integrity" necessary for listing, he never defined this term. In fact, the State never discussed in detail the criteria for eligibility set forth in 36 C.F.R. § 60.4, nor did it explain how the *Brother Jonathan* satisfied these criteria. Moreover, the State never even presented the research that it conducted on the *Brother Jonathan* in 1983. Without any supporting documentation, the weak and unsubstantiated testimony of Foster is simply insufficient to satisfy the State's burden of proving that the Secretary of the Interior has made a written determination that the *Brother Jonathan* is eligible for listing in the National Register.

known the location of the wreck. (*Id.* at 46.) But Foster admitted that the State has done nothing to ascertain the location of the Brother Jonathan. (*Id.*) Moreover, Foster's testimony is contradicted by the affidavit of Goodyear K. Walker ("Walker"), an environmental specialist employed by the State Lands Commission. In his affidavit, which is dated December 20, 1991, Walker states that he plotted the location of the *Brother Jonathan* in 1988, and included this information in the State Lands commission's "Calwreck" computer database. (Walker Dec. at ¶ 3.) Additionally, in the memorandum that the State filed in support of its restricted appearance and motion to dismiss on April 1, 1994, the State confidently declares:

> The ship lies embedded in the bottom surface in some 200 feet of water at latitude: 41 deg. 47' 20" N, longitude: 124 deg. 20' 46" W, approximately 3 and ½ miles west of Point St. George and within the State's territorial or marginal sea.[18]

(State Memo. in Support of Restricted Appearance and Mot. to Dismiss at 4, 8.)

Also, in its reply brief to DSR's motion for issuance of a warrant for arrest, the State declares:

> The State has similarly been aware of the existence of the *Brother Jonathan* for many years. As long ago as 1969, the State issued a permit for salvage of the vessel to the Brother Jonathan Company. (Official files of the State Lands Commission W-8892, W-8893, W-8894). Exten-

18. In support of an earlier motion to intervene, the State filed the affidavit of Roy H. Minnick ("Minnick"), the Supervisor of the State Lands Commission's Land Location and Boundary Section. Minnick states that he was given the location described above counsel so that he could determine whether the *Brother Jonathan* was located within California's territorial sea. (Minnick Aff. at 3.) Minnick's affidavit is dated December 23, 1991. (*Id.* at 4.)

> sive information including its location is contained in the State Lands Commission files and on its "Calwreck" database.

(State Reply Br. at 4.)

In light of the State's repeated declarations that it has known the location of the *Brother Jonathan* for several years, Foster's testimony that the State could not seek a determination of the historical significance of the *Brother Jonathan* because the State did not know the location of the wreck is simply wrong. By its own admission, the State has known, or thought that it knew, the location of the *Brother Jonathan* for many years. The State's failure to seek a determination of the *Brother Jonathan's* historical significance cannot now be excused because the State recently learned that it may have been mistaken in its knowledge of the location of the wreck. Moreover, if the *Brother Jonathan* were really as historically significant as the State claims it to be, it seems incredible that the State would allow more than ten years to elapse without so much as attempting to seek a written determination of the wreck's historical significance.[19]

Since the *Brother Jonathan* is not included in or determined to be eligible for inclusion in the National Register, and the State has never requested that the Secretary of the Interior determine the historical significance of the *Brother Jonathan*, the court finds that the *Brother Jonathan* does not fall within the third class of shipwrecks protected by the ASA.

19. Interestingly, during the September 27, 1994 hearing, the State asked its historical consultant, Frank Herbert, whether he had an expert opinion about the historical significance of the *Brother Jonathan*. (Herbert, Tr. 9/27/94 at 18.) Herbert would not say that the *Brother Jonathan* is historically significant. In fact, after some hesitation, Herbert would only say that the *Brother Jonathan* is "famous." (*Id.*)

4. *The State Has Failed to Demonstrate the Existence of a "Colorable Claim" to the Brother Jonathan under the ASA*

Because the State has failed to provide any evidence to establish that the *Brother Jonathan* is an abandoned shipwreck which is embedded in the submerged lands of California, or that the *Brother Jonathan* is an abandoned shipwreck and the Secretary of Interior has determined that the vessel is eligible for listing in the National Register, the court finds that the State has failed to demonstrate the existence of a "colorable claim" to the *Brother Jonathan* under the ASA.

C. *California Public Resources Code § 6313 is Preempted by the ASA*

In 1989, the California Legislature enacted California Public Resources Code § 6313, which asserts that the State has title to a much broader class of shipwrecks than those whose title is transferred to the states under the ASA. Section 6313(a) declares:

> The title to all abandoned shipwrecks and all archaeological sites and historic resources on or in the tide and submerged lands of California is vested in the state.

Cal. Pub. Res. Code § 6313(a).

Section 6313(b) further declares:

> As used in this section, "submerged archaeological site" and "submerged historic resource," shall be given the broadest possible meaning, to include any submerged object, structure, building, watercraft, or vessel and any associated cargo, armament, tackle, fixture, human remains, or remnant thereof, or any site, area, person, or place, which is historically or archaeologically significant, or significant in the prehistory or history or exploration, settlement, engineering, commerce, militarism, recreation, or culture of California and which is partially or

> wholly embedded in or resting on state submerged or tidal lands.

Cal. Pub. Res. Code § 6313(b).

In addition, § 6313(c) declares: "Any submerged archaeological site or submerged historic resource remaining in state waters for more than 50 years shall be presumed to be archaeologically or historically significant." Cal. Pub. Res. Code § 6313(c).

DSR argues that § 6313 of the California Public Resources Code is preempted by § 7 of the ASA, 43 U.S.C. § 2106(b). DSR is correct. There are three instances where state law will be preempted by federal law: (1) where a federal statute or regulation includes language expressly preempting state action in a given area; (2) where state action is implicitly preempted where the intent of Congress is clearly manifested, or implicit from a pervasive scheme of federal regulation that leaves no room for state or local supplementation, or implicit from the fact that federal law touches a field in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject;" and (3) where an actual conflict exists between state and federal law. *Barber v. Hawaii*, 42 F.3d 1185, 1189 (9th Cir. 1994) (citations omitted).

In this case, there can be no doubt that § 6313, insofar as it asserts title to shipwrecks that are not covered by the ASA, is preempted by the ASA. Section 7 of the ASA clearly states that the Act "shall not change the laws of the United States relating to shipwrecks, other than those to which this chapter applies." 43 U.S.C. § 2106(b). In addition, the legislative history of the ASA declares:

> The [Congress] intends to carve out a limited exception from general admiralty principles for those classes of shipwrecks to which this Act applies. All other shipwrecks, including those in federal waters, remain subject to the uniform principles of admiralty law, except as may

be provided in other federal law.

Pub. L. 100–298, 1988 U.S. Code Cong. and Adm. News at 377. Congress only intended to transfer ownership and ensure protection of shipwrecks of "historic significance," which it estimated to be a mere five to ten percent of the 50,000 abandoned shipwrecks thought to be located in the navigable waters of the United States. *Id.* at 365. Thus, § 6313 is superseded by the first two instances of preemption, where the federal statute includes language expressly preempting state action in a given area, and where state action is implicitly preempted because federal admiralty law is so dominant that it will be assumed to preclude enforcement of state laws on the same subject.[20]

Finally, it is clear that an actual conflict exists between state and federal law. The ASA declares that the United States asserts title to only abandoned shipwrecks that are embedded in the submerged lands of a state, or, if they are not embedded, where they are determined to be eligible for listing in the National Register, and the United States transfers its title to these shipwrecks to the state in or on whose submerged lands the shipwreck is located. Section 6313 of the California Public Resources Code, however, declares that title to any shipwreck, or portion thereof, that has been resting in California waters for more than fifty years is vested in the State. Section 6313's broad claim of title plainly conflicts with the title to ships transferred to the states under the ASA.

Both the language and history of the ASA make it clear that Congress intended the federal courts to retain admiralty jurisdiction over shipwrecks that are not part of the specifically defined class of shipwrecks protected by the ASA. Nothing in the ASA gives states the authority to assert title to ship-

20. Article III, section 2 of the United States Constitution confers upon the federal courts "all cases of admiralty and maritime jurisdiction." This jurisdiction is exclusive to the federal courts pursuant to 28 U.S.C. § 1333(1).

wrecks that are not covered by the Act. In fact, nothing in the ASA gives states the authority to assert title to *any* shipwreck, or any part thereof.[21] Instead, as Congress intended, the ASA asserts title to a certain class of abandoned shipwrecks on behalf of the United States, transfers title to these, and only these, shipwrecks to the states, and retains federal jurisdiction over all other shipwrecks. *See* 43 U.S.C. §§ 2105(a) and (c), and 2106(b). Thus, § 6313 of the California Public Resources Code, insofar as it asserts title to shipwrecks that are not covered by the ASA, is preempted by the ASA.[22] Additionally, because § 6313 of the California Public Resources Code is preempted by the ASA, the court finds that the State's alternative claim of title is without merit.

D. *The Constitutionality of the ASA*

Because the court finds that the ASA does not apply to the *Brother Jonathan*, and that California Public Resources Code § 6313 is preempted by the ASA, the court need not determine whether the ASA is constitutional. *See Seabird*, 941 F.2d at 532 (*citing Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988)); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936). The court notes, however, that if § 6313 of the California Public Resources Code were not preempted by the ASA, the validity of the California law could

21. In fact, under the ASA, states are only given the authority to develop "legislation and regulations to carry out their responsibilities under [the Act]." 43 U.S.C. § 2104(c). Section 6313's broad assertion of title to all shipwrecks and cargo remaining in State waters for more than fifty years old goes far beyond the authority granted by the ASA.

22. To the extent that subsections (d) through (i) of § 6313 apply only to abandoned shipwrecks that have been transferred to the State under 43 U.S.C. § 2105(c), these subsections shall remain valid. *See* 43 U.S.C. § 2103(a)(2)(C). These subsections, however, shall not apply to shipwrecks that have not been transferred to the State under 43 U.S.C. § 2105(c).

provide strong evidence that the ASA destroys the uniformity of admiralty and maritime law throughout the whole of the United States. *See Panama R. Co. v. Johnson*, 264 U.S. 375 (1924). The ASA does not give individual states the authority to enact legislation to assert title to virtually all shipwrecks in their territorial waters. If it did, there would be one exception to 28 U.S.C. § 1333 for every state with a territorial sea. This would clearly be a violation of Article III, section 2, of the Constitution of the United States.

E. *DSR's Admiralty In Rem Action*

Because the State has failed to demonstrate the existence of a "colorable claim" to the *Brother Jonathan* under federal or state law, the court has subject matter jurisdiction over DSR's admiralty *in rem* action pursuant to Article III, section 2, of the Constitution of the United States, and 28 U.S.C. § 1333. DSR has brought this action invoking the court's admiralty and maritime jurisdiction by stating a maritime claim under Rule 9(h) of the Federal Rules of Civil Procedure. The court has jurisdiction *in personam* over DSR and over any claimant who may intervene in this action in the future. *See Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 566–68 (5th Cir. 1981) (*Treasure Salvors III*). The court also has jurisdiction *in rem* over the *Brother Jonathan* because it is located within the territorial waters of the State of California.[23] *Treasure Salvors III*, 640 F.2d at 566–68.

At this time, DSR has moved for the issuance of a warrant

23. Even if the *Brother Jonathan* is located outside of the territorial waters of the State of California, the court would have *quasi in rem* jurisdiction over the shipwreck because the *Brother Jonathan* is a shipwreck upon which salvage operations are being conducted, and there is a reasonable likelihood that the salvage operation will result in other portions of the shipwreck being brought into the territorial, and thus *in rem*, jurisdiction of the court. *See Moyer v. The Andrea Doria*, 836 F. Supp. 1099, 1104 (D. N.J. 1993).

of arrest of the *Brother Jonathan*, her appurtenances and cargo, pursuant to Supplemental Admiralty and Maritime Claims Rule, C(3). DSR also has moved for the issuance of an order appointing DSR custodian of the wreck, and directing DSR to take and keep possession of the wreck, to the extent possible, as exclusive salvor of the vessel until such time as the court determines the manner in which the wreck and its cargo, or the proceeds therefrom, should be distributed. Although DSR's requests are encompassed in a single motion, the court will address this motion as if it were two separate motions.

1. *Motion for Issuance of Warrant of Arrest*

Pursuant to Supplemental Admiralty and Maritime Claims Rule, C(1), an action *in rem* may be brought against a vessel: (a) to enforce any maritime lien; or (b) whenever a statute of the United States provides for a maritime action *in rem* or a proceeding analogous thereto. Supplemental Admiralty and Maritime Claims Rule, C(1). In actions *in rem*, the party seeking relief must "describe with reasonable particularity the property that is the subject of the action, and state that it is within the district or will be during the pendency of the action." Supplemental Admiralty and Maritime Claims Rule, C(2). If, after reviewing the plaintiff's verified complaint and any supporting papers filed therewith, the court finds that "the conditions for an action in rem appear to exist," the court may issue an order so stating and authorizing the Clerk of the Court to issue a warrant for the arrest of the vessel or other property that is the subject of the action. Supplemental Admiralty and Maritime Claims Rule, C(3).[24] If the property is

24. Supplemental Admiralty and Maritime Claims Rule, C(3) states, in pertinent part:

> Judicial Authorization and Process. Except in actions by the United States for forfeitures or federal statutory violations, the verified complaint and any supporting papers shall be reviewed by the court and,

a vessel, or a vessel and tangible property on board the vessel, the warrant is delivered to the United States Marshal for service. *Id.* The United States Marshal may effectuate service by serving the warrant upon artifacts brought into the district and deposited into the custody of the court. Supplemental Admiralty and Maritime Claims Rule, E(3). *See also Columbus-America*, 742 F. Supp. at 1333–34, *rev'd on other grounds*, 974 F.2d 450 (4th Cir. 1992).

After carefully reviewing DSR's verified complaint, the briefs and affidavits filed in support of DSR's motion for issuance of a warrant of arrest, and the evidence and arguments presented at the hearings on September 9, 1994 and September 27, 1994, the court finds that the conditions for an action *in rem* appear to exist. DSR has brought this action to enforce a maritime lien in the form of a claim of salvage against the *Brother Jonathan*. (Complaint ¶ 17.) DSR has described with particularity the property that is the subject of this action, and it has sufficiently demonstrated that the *Brother Jonathan* is within the district, or that the court has jurisdiction *in rem* over the vessel. (*Id.* at ¶ 18.) Consequently, the court will grant DSR's motion and issue an order authorizing the Clerk of the Court to issue a warrant for the arrest of the *Brother Jonathan*, her appurtenances, furniture and cargo.

> if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant. If the property is a vessel or a vessel and tangible property on board the vessel, the warrant shall be delivered to the marshal for service. If other property, tangible or intangible is the subject of the action, the warrant shall be delivered by the clerk to a person or organization authorized to enforce it, who may be a marshal, a person or organization contracted with by the United States, a person specially appointed by the court for that purpose, or, if the action is brought by the United States, any officer or employee of the United States.
>
> Supplemental Admiralty and Maritime Claims Rule, C(3).

The warrant for arrest shall be delivered to the United States Marshal, and the Marshal will be directed to serve the warrant upon DSR, as custodian of the artifacts already recovered from the *Brother Jonathan*. In addition, pursuant to Supplemental Admiralty and Maritime Claims Rule, C(4), within ten days of the service of the warrant of arrest, DSR will be required to provide notice by publication of the action and arrest in a newspaper of general circulation in the district, as designated in Local Rule 100–5(a), and in the form described by Local Admiralty Rule 605–3(a).

2. *Motion for Order Appointing DSR Custodian and Exclusive Salvor of the Brother Jonathan*

It is common in admiralty cases for the court to appoint a substitute custodian in the place of the United States Marshal to ensure the safekeeping of a vessel that has been placed under arrest. *See* Local Admiralty Rule 610–13(a). It also is common for the first finder of a shipwreck to seek injunctive relief barring competing salvors from interfering with the original finder's right to exclusive possession of, and right to salvage, the vessel. *See Treasure Salvors III*, 640 F.2d at 568–73; *Columbus-America*, 742 F. Supp. at 1330–33, *rev'd on other grounds*, 974 F.2d 450 (4th Cir. 1992); *MDM Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F. Supp. 308 (S.D. Fla. 1986). However, "a would-be salvor, upon discovery of a wreck, does not automatically acquire rights to it in perpetuity." *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1061 (1st Cir. 1987) (citation omitted). Before the court can grant exclusive salvage rights in a vessel to the first finder, the court must make certain findings regarding the first finder's possession of the vessel and ability to successfully complete salvage operations. *MDM Salvage*, 631 F. Supp. at 310–13.

If the first finder maintains appropriate possession and control of an identifiable wreck site, he may acquire the

exclusive right to conduct salvage operations. *Id.* at 311 (citation omitted). As the Fifth Circuit stated in *Treasure Salvors III*:

> A salvor . . . has a valuable interest in his salvage operations which the law protects by vesting in the salvor certain rights. Among the most important of these rights are the right to exclude others from participating in the salvage operations, so long as the original salvor appears ready, willing and able to complete the salvage project, and the right to possession of the salved property, a right exclusive even of the owner, until such time as the salvage lien on the property is extinguished or adequate security for this obligation is given. Although the law of salvage grants the salvor a right to possession of the property, the salvage of a vessel or goods at sea, even when the goods have been abandoned, does not divest the original owner of title or grant ownership rights to the salvor, except in extraordinary cases[.]

640 F.2d at 567.

To enjoy the continued right to exclusive possession of a shipwreck and protection from interference of rival salvors, a salvor must exercise due diligence and must be capable of actually saving the property from destruction, damage or loss. *MDM Salvage*, 631 F. Supp. at 312. The salvor must intend to reduce the property to physical possession by dealing with the entire wreck site in such a manner as to warn other potential salvors of the claimed area. *Id.* (citation omitted). The salvor, however, may lose his right to uninterrupted salvage operations if he does not assiduously undertake efforts to rescue the property. *Id.* Notorious possession is a prerequisite to the creation and maintenance of a salvor's privilege of exclusive possession. *Id.* (*citing Cobb Coin*, 525 F. Supp. at 204–05). The salvor's possession need not be continuous, however, it must only be as much as the "nature and situation" of the salvage operations permit. *Moyer*, 836 F. Supp.

at 1106 (citation omitted). Additionally, the salvor's possession is not defeated when the salvor leaves the wreck for a justifiable reason and with an intention of returning. *Id.* at 1107 (citation omitted).

A party seeking a preliminary injunction in the Ninth Circuit typically must prove either "(1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor." *Los Angeles Memorial Coliseum Com. v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980). These are not separate tests, but rather "a continuum of equitable discretion whereby the greater the relative hardship to the moving party, the less probability of success must be shown." *Regents of University of California v. American Broadcasting Cos.*, 747 F.2d 511, 515 (9th Cir. 1984). To show a likelihood of success on the merits, the moving party need not show with certainty that it will ultimately prevail; however, the "irreducible minimum" required is either a "*fair* chance for success on the merits" or the raising of "questions serious enough to require litigation." *Benda v. Grand Lodge of International Asso. of Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979).

Additionally, for a preliminary injunction to issue in a shipwreck case where the court has already issued an initial arrest order, and the preliminary injunction is designed to protect salvage operations, the "salvor's efforts must be (1) undertaken with due diligence, (2) ongoing, and (3) clothed with some prospect of success." *Id.* at 1106 (citation omitted). In cases where the salvor is seeking exclusive salvage rights to a vessel, the court also must examine the extent to which the party seeking injunctive relief has: (1) acted in good faith; (2) "engaged in a sustained and significant commitment to salvage" the vessel; (3) "demonstrated a significant and sustained commitment of capital and resources to its area of arrest"; (4) conducted independent historical research on the vessel; and (5) attempted to preserve the

archaeological value of the wreck by marking and photographing the site. *Id.* at 1107; *MDM Salvage*, 631 F. Supp. at 310–11.

In this case, there is no doubt that DSR is entitled to injunctive relief. DSR has acted in good faith. It has demonstrated that it will probably succeed on the merits of its admiralty *in rem* action because it has already located and retrieved artifacts from the *Brother Jonathan*. DSR has further demonstrated that it will suffer irreparable injury if injunctive relief is not granted because DSR will lose its right, as first finder of the *Brother Jonathan*, to retain exclusive possession of the shipwreck and to be free from interference of rival salvors. DSR has constructive possession of the *Brother Jonathan*, insofar as it has unique knowledge of the location of the wreck and it has demonstrated its ability to locate and recover items from the wreck. DSR also has actual possession of the *Brother Jonathan*, insofar as it has recovered several artifacts from the wreck and brought them into the jurisdiction of this court. DSR has expended many years and substantial sums of money to locate the *Brother Jonathan*, and to retrieve the artifacts that have been brought into the jurisdiction of this court. DSR also has conducted independent historical research on the vessel, and it has attempted to preserve the archaeological value of the wreck by photographing the site. Moreover, although the exact location of the *Brother Jonathan* is known only to DSR, with the filing of DSR's motion, it became a matter of public record that the *Brother Jonathan* is located approximately four and one half miles off shore in the vicinity of Crescent City, at a point approximately one and one half miles from Jonathan Rock. Once public notice is given of the execution of the warrant of arrest, it is quite likely that competing salvors will be alerted to the existence of the wreck and attempt to salvage the vessel.

While the court believes that DSR is entitled to a preliminary injunction protecting its continued right to exclusive possession of the *Brother Jonathan*, and protecting it from interference from rival salvors, there is still one obstacle that

stands in the way of the issuance of a preliminary injunction: the court is unable to fashion appropriate equitable relief because it does not know the precise location of the *Brother Jonathan*.

In cases where possession, dominion and control over a shipwreck are maintained, the court may issue a preliminary injunction protecting a first finder's exclusive right to possession of the vessel, and prohibiting rival salvors from conducting salvage operations within a reasonable area for a reasonable period of time. *Treasure Salvors, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel, "Nuestra Senora de Atocha"*, 546 F. Supp. 919, 930 (S.D. Fla. 1981). In fashioning such equitable relief, however, "[t]he difficulty lies not so much in recognizing under maritime law, the equities of the situation, but in the fashioning of relief in a manner which does not do violence to freedom of navigation and travel on the high seas and other basic rights of the world at large to use and travel the high seas." *Id.*

What then is a reasonable area? The answer to this question is fact specific. In some cases where the location of the wreck is known, courts have issued injunctions barring competing salvage operations within areas comprising several square miles. *See, e.g., Treasure Salvors*, 525 F. Supp. at 930–31 (13.3 square miles); *Cobb Coin*, 525 F. Supp. at 220. In another case, however, the district court issued a preliminary injunction barring competing salvage operations only on a certain portion of a wreck. *See Moyer*, 836 F. Supp. at 1108.

In the present case, DSR has requested that the court declare a "safety zone in a circle with a radius of 5200 feet with the wreck as the centerpoint around the salvage site[.]" (Complaint ¶ 21.) Given the wreck's proximity to shore, and the fact that the *Brother Jonathan* remains largely intact, DSR's request appears reasonable. After considering the applicable case law, the court finds that a preliminary injunction prohibiting competing salvage operations from occurring within a one mile radius of the *Brother Jonathan* will not "do

violence to freedom of navigation and travel on the high seas." The court will issue a preliminary injunction incorporating DSR's request as soon as DSR divulges the precise location of the *Brother Jonathan* to the court.[25]

DSR also has requested that it be given priority salvage status, and sole and exclusive possession of the *Brother Jonathan*, for a period of at least five years. (Complaint ¶ 21.) This request is less reasonable. *See Treasure Salvors*, 546 F. Supp. at 930. Although DSR has demonstrated a present ability to salvage the *Brother Jonathan*, it has not offered any reasoning to support its request for a five year injunction, other than its assertion that salvage efforts are expected to take that long. Moreover, although DSR has exercised due diligence to date, there is no guarantee that DSR will continue to diligently engage in a sustained and significant commitment to salvage the *Brother Jonathan* if it is given five years to complete the task. Under the circumstances, an injunction covering a period of 18 months seems more reasonable. At least 90 days, but no more than 120 days, before the expiration of the initial time period, DSR may apply to the court to extend the preliminary injunction from year to year until salvage operations are completed. *Id.* at 930–31. DSR's application should include a detailed description of its salvage efforts to date, including a description of the number of days or man-hours expended during salvage operations, the extent to which DSR has preserved the archaeological value of the wreck, and an outline of DSR's future plans for salvaging the wreck.

While the court will not issue a preliminary injunction unless and until DSR submits to the court the exact location

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25. DSR is understandably reluctant to divulge the precise location of the *Brother Jonathan* in either open court or in documents that are not filed under seal. The court understands this reluctance; therefore, DSR may divulge the location of the wreck in a document filed under seal. In the alternative, DSR may propose a set of geographic coordinates which will comprise a reasonable area which will be the subject of the preliminary injunction.

of the *Brother Jonathan*, the court will issue an order appointing DSR as substitute custodian of the *Brother Jonathan* in the place of the United States Marshal, and DSR will be charged with ensuring the safekeeping of the vessel and any artifacts recovered therefrom, until further order of this court. *See* Local Admiralty Rule 610–13(a).

III. *CONCLUSION*

Based on the evidence of record, and for the reasons set forth above, the court finds that the State has failed to demonstrate the existence of a "colorable claim" to the *Brother Jonathan*. The State has failed to demonstrate that the *Brother Jonathan* is "abandoned" and "embedded" as defined by the ASA, or that the Secretary of the Interior has made a written determination that the *Brother Jonathan* is eligible for listing in the National Register. The court also finds that § 6313 of the California Public Resources Code is preempted by 43 U.S.C. § 2106(b). Therefore, the State has failed to demonstrate the existence of a "colorable claim" to the *Brother Jonathan* under California law. Consequently, the State's motion to dismiss DSR's admiralty *in rem* action will be denied.

The court also finds that DSR has sufficiently demonstrated that the conditions for an action *in rem* appear to exist. Therefore, DSR's motion for issuance of a warrant for arrest of the *Brother Jonathan* pursuant to Supplemental Admiralty and Maritime Claims Rule, C(3) will be granted. DSR also will be appointed substitute custodian of the *Brother Jonathan* in the place of the United States Marshal, and DSR will be charged with ensuring the safekeeping of the vessel and any artifacts recovered therefrom, until further order of this court.

Finally, the court finds that DSR, as the first finder of the wreck of the *Brother Jonathan*, is entitled to injunctive relief in the form of an order directing DSR to take and keep possession of the wreck, to the extent possible, as exclusive salvor of the vessel until such time as the court determines the

manner in which the wreck and its cargo, or the proceeds therefrom, should be distributed. The court, however, will not issue such an order unless DSR divulges the precise location of the *Brother Jonathan* to the court within 15 days of the date of the order granting DSR's motion for issuance of a warrant of arrest.

Appropriate orders will be entered.

APPENDIX C

In the United States District Court
for the Northern District of California

No. C 91-3899 LCB

Deep Sea Research, Inc.,
Plaintiff,

v.

The Brother Jonathan, her
appurtenances, furniture, cargo, etc.,
Defendant,

and

State of California, State Lands Commission,
and the United States of America,
Intervening Defendants.

ORDER

AND NOW, TO WIT, this 15th day of March, 1995, upon consideration of the motion of intervening defendant, the State of California, State Lands Commission ("State"), to dismiss plaintiff Deep Sea Research, Inc.'s admiralty *in rem* action against defendant, the wreck of the *Brother Jonathan*, her appurtenances, furniture and cargo, for lack of subject matter jurisdiction; the briefs and affidavits filed in support of, and in opposition to, the State's motion; and after two hearings before this court, on September 9, 1994 and September 27, 1994; IT IS ORDERED that the State's motion is *denied*.

/s/
LOUIS C. BECHTLE, J.

APPENDIX D

In the United States District Court
for the Northern District of California

No. C 91-3899 LCB

Deep Sea Research, Inc.,
Plaintiff,

v.

The Brother Jonathan, her
appurtenances, furniture, cargo, etc.,
Defendant,

and

State of California, State Lands Commission,
and the United States of America,
Intervening Defendants.

ORDER

AND NOW, TO WIT, this 15th day of March, 1995, upon consideration of plaintiff Deep Sea Research, Inc.'s ("DSR") motion for issuance of a warrant of arrest of the defendant, the wreck of the *Brother Jonathan*, her appurtenances, furniture and cargo (collectively "*Brother Jonathan*"), pursuant to Supplemental Admiralty and Maritime Claims Rule, C(3), and for a court order appointing DSR exclusive salvor of the vessel; DSR's brief and affidavits filed in support of this motion; and DSR's verified complaint; the court finds that DSR has sufficiently demonstrated that the conditions for an action *in rem* appear to exist. Therefore, IT IS ORDERED that DSR's motion for issuance of a warrant of arrest of the *Brother Jonathan* is *granted*.

IT IS FURTHER ORDERED that:

(1) pursuant to Supplemental Admiralty and Maritime Claims Rule, C(3), the Clerk of the Court is directed to issue

a warrant for the arrest of the *Brother Jonathan*, her appurtenances, furniture and cargo;

(2) the Clerk of the Court shall promptly deliver the warrant for arrest to the United States Marshal, who shall execute the same by serving it upon plaintiff Deep Sea Research, Inc.;

(3) the court hereby appoints Deep Sea Research, Inc. as substitute custodian of the *Brother Jonathan* in the place of the United States Marshal. DSR shall ensure the safekeeping of the vessel and any artifacts recovered therefrom, until further Order of this court; and

(4) pursuant to Supplemental Admiralty and Maritime Claims Rule, C(3), DSR shall, within thirty (30) days of the date of this Order, cause public notice of this action and arrest to be given in a newspaper of general circulation in this district.

The court does not at this time make any Order as to salvor's fees, or title to or distribution of any artifacts recovered from the wreck. The court will reserve judgment on these matters until further notice.

/s/
LOUIS C. BECHTLE, J.

APPENDIX E

In the United States District Court
for the Northern District of California

No. C 91-3899 LCB

Deep Sea Research, Inc.,
Plaintiff,

v.

The Brother Jonathan, her
appurtenances, furniture, cargo, etc.,
Defendant,

and

State of California, State Lands Commission,
and the United States of America,
Intervening Defendants.

ORDER

AND NOW, TO WIT, this 5th day of April, 1995, upon consideration of plaintiff Deep Sea Research, Inc.'s ("DSR") motion for a preliminary injunction appointing DSR exclusive salvor of the wreck of the *Brother Jonathan*, her appurtenances, furniture and cargo (collectively "*Brother Jonathan*"), protecting DSR's continued right to exclusive possession of the *Brother Jonathan*, and protecting DSR from interference from rival salvors, and pursuant to the court's Memorandum dated March 15, 1995, IT IS ORDERED that said motion is *granted*.

IT IS FURTHER ORDERED as follows:

1. In accordance with the court's March 15, 1995 Memorandum, DSR is hereby given priority salvage status, and sole and exclusive possession of the *Brother Jonathan*;

2. All competing salvors, would-be salvors, or divers, are hereby enjoined from interfering with DSR's efforts to

recover artifacts from the *Brother Jonathan*;

3. All competing salvors, would-be salvors, or divers, are hereby enjoined from conducting salvage operations or collecting artifacts within an area described as a circle having a radius of 5,200 feet (*i.e.*, a diameter of 10,400 feet), having its center point at the geographic coordinates 41 degrees, 46.29 minutes North, and 124 degrees, 20.50 minutes West;

4. This preliminary injunction shall remain in effect for a period of eighteen (18) months from the date of this Order;

5. At least 90 days, but no more than 120 days, before the expiration of the eighteen (18) month time period, DSR may apply to the court to extend the preliminary injunction from year to year until salvage operations are completed. DSR's application shall include a detailed description of its salvage efforts to date, including a description of the number of days or man-hours expended during salvage operations, the extent to which DSR has preserved the archaeological value of the wreck, and an outline of DSR's future plans for salvaging the *Brother Jonathan*.

/s/
LOUIS C. BECHTLE, J.

APPENDIX F

ABANDONED SHIPWRECK ACT OF 1987
102 Stat. 432
43 U.S.C. §§ 2101-2106

§ 2101.

The Congress finds that—

(a) States have the responsibility for management of a broad range of living and nonliving resources in State waters and submerged lands; and

(b) included in the range of resources are certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention.

§ 2102.

For purposes of this chapter—

(a) the term "embedded" means firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof;

(b) the term "National Register" means the National Register of Historic Places maintained by the Secretary of the Interior under section 470a of Title 16;

(c) the terms "public lands", "Indian lands", and "Indian tribe" have the same meaning given the terms in the Archaeological Resource Protection Act of 1979 (16 U.S.C. 470aa-470*ll*);

(d) the term "shipwreck" means a vessel or wreck, its cargo, and other contents;

(e) the term "State" means a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Northern Mariana Islands; and

(f) the term "submerged lands" means the lands—

(1) that are "lands beneath navigable waters," as defined in section 1301 of this title;

(2) of Puerto Rico, as described in section 749 of Title 48;

(3) of Guam, the Virgin Islands and American Samoa, as described in section 1705 of Title 48; and

(4) of the Commonwealth of the Northern Mariana Islands, as described in section 801 of Public Law 94-241 (48 U.S.C. 1681).

§ 2103.

(a) Access rights

In order to—

(1) clarify that State waters and shipwrecks offer recreational and educational opportunities to sport divers and other interested groups, as well as irreplaceable State resources for tourism, biological sanctuaries, and historical research; and

(2) provide that reasonable access by the public to such abandoned shipwrecks be permitted by the State holding title to such shipwrecks pursuant to section 2105 of this title,

it is the declared policy of the Congress that States carry out their responsibilities under this chapter to develop appropriate and consistent policies so as to—

(A) protect natural resources and habitat areas;

(B) guarantee recreational exploration of shipwreck sites; and

(C) allow for appropriate public and private sector recovery of shipwrecks consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites.

(b) Parks and protected areas

In managing the resources subject to the provisions of this chapter, States are encouraged to create underwater parks or areas to provide additional protection for such resources. Funds available to States from grants from the Historic Preservation Fund shall be available, in accordance with the provisions of title I of the National Historic Preservation Act, for the study, interpretation, protec-

tion, and preservation of historic shipwrecks and properties.

§ 2104.

(a) Purposes of guidelines; publication in Federal Register

In order to encourage the development of underwater parks and the administrative cooperation necessary for the comprehensive management of underwater resources related to historic shipwrecks, the Secretary of the Interior, acting through the Director of the National Park Service, shall within nine months after April 28, 1988, prepare and publish guidelines in the Federal Register which shall seek to:

(1) maximize the enhancement of cultural resources;

(2) foster a partnership among sport divers, fishermen, archeologists, salvors, and other interests to manage shipwreck resources of the States and the United States;

(3) facilitate access and utilization by recreational interests;

(4) recognize the interests of individuals and groups engaged in shipwreck discovery and salvage.

(b) Consultation

Such guidelines shall be developed after consultation with appropriate public and private sector interests (including the Secretary of Commerce, the Advisory Council on Historic Preservation, sport divers, State Historic Preservation Officers, professional dive operators, salvors, archeologists, historic preservationists, and fishermen).

(c) Use of guidelines in developing legislation and regulations

Such guidelines shall be available to assist States and the appropriate Federal agencies in developing legislation and regulations to carry out their responsibilities under this chapter.

§ 2105.

(a) United States title

The United States asserts title to any abandoned shipwreck that is—

(1) embedded in submerged lands of a State;

(2) embedded in coralline formations protected by a State on submerged lands of a State; or

(3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register.

(b) Notice of shipwreck location; eligibility determination for inclusion in National Register of Historic Places

The public shall be given adequate notice of the location of any shipwreck to which title is asserted under this section. The Secretary of the Interior, after consultation with the appropriate State Historic Preservation Officer, shall make a written determination that an abandoned shipwreck meets the criteria for eligibility for inclusion in the National Register of Historic Places under clause (a)(3).

(c) Transfer of title to States

The title of the United States to any abandoned shipwreck asserted under subsection (a) of this section is transferred to the State in or on whose submerged lands the shipwreck is located.

(d) Exception

Any abandoned shipwreck in or on the public lands of the United States is the property of the United States Government. Any abandoned shipwreck in or on any Indian lands is the property of the Indian tribe owning such lands.

(e) Reservation of rights

This section does not affect any right reserved by the United States or by any State (including any right reserved with respect to Indian lands) under—

(1) section 1311, 1313, or 1314 of this title; or

(2) section 414 or 415 or Title 33.

§ 2106.

(a) Law of salvage and the law of finds

The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 2105 of this title applies.

(b) Laws of the United States

This chapter shall not change the laws of the United States relating to shipwrecks, other than those to which this chapter applies.

(c) Effective date

This chapter shall not affect any legal proceeding brought prior to April 28, 1988.

APPENDIX G

SUBMERGED LANDS ACT
67 Stat. 29
43 U.S.C. §§ 1301-1315

§ 1301.

When used in this subchapter and subchapter II of this chapter—

(a) The term "lands beneath navigable waters" means—

[Material omitted in printing]

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, . . .

[Material omitted in printing]

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico, except that any boundary between a State and the United States under this subchapter or subchapter II of this chapter which has been or is hereafter fixed by coordinates under a final decree of the United States Supreme Court shall remain immobilized at the coordinates provided under such decree and shall not

be ambulatory;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

[Material omitted in printing]

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

[Material omitted in printing]

(g) The term "State" means any State of the Union;

(h) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation.

[Material omitted in printing]

§ 1311.

(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) (1) The United States hereby releases and relin-

quishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; . . .

[Material omitted in printing]

(d) Nothing in this subchapter or subchapter I of this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

[Material omitted in printing]

§ 1314.

(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

[Remainder of statute omitted in printing]

APPENDIX H

CALIFORNIA STATUTES OF 1989, CHAPTER 732

SECTION 1. The Legislature finds and declares as follows:

(a) California has a rich and varied maritime history extending back thousands of years before its discovery by Spanish explorers. Prehistoric inhabitants developed coastal trade based on an elaborate maritime technology. Later colonization by peoples from all over the world was accomplished by sea. This history has left California with a rich maritime legacy in underwater antiquities. The Legislature finds an urgent need to identify and protect the historic, scientific, and cultural values inherent in submerged antiquities and to preserve and maintain objects of state or national significance for the benefit and inspiration of all of the people of the state.

(b) Technological innovation is making the submerged lands of the state more accessible each year and providing unprecedented opportunities to learn more about the people of past societies and civilizations who lived and traveled along the coast of our state. California has over one-half million certified divers and that number is increasing daily. The large number of divers, and the advancement in marine technology, without adequate diver education and resource protection, will jeopardize California's underwater cultural heritage. It is the intent of the Legislature that the State Lands Commission, in its role as trustee of the submerged lands of the state, administer the Shipwreck and Historic Maritime Resources Program established by this act to preserve and protect the underwater cultural resources of the state.

[Material omitted in printing]

SEC. 3. Section 6309 of the Public Resources Code is amended to read:

6309. (a) The commission shall administer the Shipwreck and Historic Maritime Resources Program, which consists of the activities of the commission pursuant to this section and Sections 6313 and 6314.

(b) The commission has exclusive jurisdiction with respect to salvage operations over and upon all tide and submerged lands of the state. The commission may grant the privilege of conducting salvage operations upon or over any of those lands by the issuance of permits. The commission may adopt any rules and regulations in connection with applications for those permits, and the operations to be conducted thereunder, that the commission determines to be necessary to protect those lands and the uses and purposes reserved to the people of the state.

(c) The commission may issue permits for salvage on granted tide and submerged lands only after consultation with the grantee and a determination by the commission that the proposed salvage operation is not inconsistent with the purposes of the grant.

(d) A salvage permit shall be required of any person or entity to conduct any salvage operation. As used in this section and Section 6313, "salvage operation" means any activity, including search by electronic means, or exploration or excavation using tools or mechanical devices, with the objective of locating and removing objects from the surface or subsurface of state submerged lands.

(e) Salvage permits shall be issued for one year, with the option to renew the permit for additional one-year periods at the discretion of the commission upon a showing that the permitholder has diligently and lawfully pursued the permitted activity.

(f) The commission may require that a person designated by the commission and paid by the permitholder be present during all salvage operations to observe and monitor compliance with the terms of the permit.

(g) The commission may issue recreational recovery permits, which would allow exploration or excavation with small hand tools, but without mechanical devices, for the limited recovery of small objects. Those permits are not salvage permits and the activities do not constitute a salvage operation. The commission shall not require a permit for any recreational

diving activity which does not disturb the subsurface or remove objects or materials from a submerged archaeological site or submerged historic resource as defined in Section 6313. Recreational recovery permits shall not be issued for archaeological or historical resources.

(h) Permits may be revoked by the commission, after notice to the permitholder, at any time the commission finds that the permitholder has failed to comply with the terms of the permit or any law or regulation governing the permitted activity. An application for a permit may be denied by the commission when it finds that the applicant has failed to provide, for a period of 60 days, information specifically requested by the commission which is necessary to complete the application.

(i) When title to the objects, including a vessel, to be recovered is vested in the state, the commission shall provide for fair compensation to the permitholder in terms of a percentage of the reasonable cash value, or a fair share, of the objects recovered. The reasonable cash value of the objects shall be determined by appraisal by qualified experts selected by the commission. The commission shall determine the amount constituting fair compensation, taking into consideration the circumstances of each case. Title to all objects recovered is retained by the state until it is released by the commission.

(j) The commission may fix and collect reasonable fees and costs for the processing and issuance of permits under this section. The applicant may be required to deposit funds with the commission sufficient to cover costs and expenses chargeable to the applicant by law or by an agreement for reimbursement.

[Material omitted in printing]

SEC. 5. Section 6313 is added to the Public Resources Code, to read:

6313. (a) The title to all abandoned shipwrecks and all archaeological sites and historic resources on or in the tide and submerged lands of California is vested in the state. All abandoned shipwrecks and all submerged archaeological sites

and submerged historic resources of the state shall be in the custody and subject to the control of the commission for the benefit of the people of the state of California. The commission may transfer title, custody, or control to other state agencies or recognized scientific or educational organizations, institutions, or individuals by appropriate legal conveyance.

(b) As used in this section, "submerged archaeological site" and "submerged historic resource," shall be given the broadest possible meaning, to include any submerged object, structure, building, watercraft, or vessel and any associated cargo, armament, tackle, fixture, human remains, or remnant thereof, or any site, area, person, or place, which is historically or archaeologically significant, or significant in the prehistory or history or exploration, settlement, engineering, commerce, militarism, recreation, or culture of California and which is partially or wholly embedded in or resting on state submerged or tidal lands.

(c) Sites with archaeological or historic significance shall be determined by reference to their eligibility for inclusion in the National Register of Historic Places. Any submerged archaeological site or submerged historic resource remaining in state waters for more than 50 years shall be presumed to be archaeologically or historically significant. The commission, with the assistance of the State Office of Historic Preservation, shall identify, compile, and maintain an inventory of shipwreck sites of archaeological or historical significance and shall make the listing available to the public.

(d) Permits for salvage operations involving submerged archaeological sites or submerged historic resources may be issued by the commission to individuals or organizations representing museums, universities, colleges, or other recognized scientific or educational institutions and individuals and organizations which demonstrate the capability to conduct those activities, as determined by the commission. The commission may deny an application for a permit to any applicant who the commission determines cannot demonstrate an ability to properly conduct salvage activities. The commission

may consider the applicant's past conduct with regard to salvage operations when making this determination.

(e) Prior to the commencement of an activity permitted under subdivision (d), the applicant shall provide to the commission a detailed plan which provides for the protection and preservation of the site or objects or materials removed from the site consistent with contemporary professional standards of archaeological data recovery. All activities permitted under subdivision (d) or required by this subdivision shall be accomplished under the supervision of a person who meets the professional qualifications required of a marine archaeologist.

(f) The commission shall forward applications for permits for excavation of a submerged archaeological site or submerged historic resource in state waters, including the information required by subdivision (e), to the State Historic Preservation Officer for technical review of the archaeological plan and recommendation concerning the preservation and protection of the site or resource.

(g) The commission shall provide for the disposition of all objects or other materials recovered, which may include provisions for display in museums, educational institutions, and other appropriate locations available to the public.

(h) The commission may contract with persons, firms, corporations, or institutions who, for the privilege of having temporary possession of recovered archaeological resources, will advance to the commission the money necessary to conduct salvage operations or to purchase from a permitholder, from his or her fair share, archaeological resources which the commission determines should remain the property of the state. A contract may be made only on the condition that the commission may, at any time, repay the money advanced, without interest or additional charges of any kind, and recover possession of the resources. During the time the resources are in the possession of the entity advancing the money, the resources shall be available for viewing by the general public at a nominal fee or without charge.

(i) The commission may also contract with other state

agencies, qualified public or private institutions, local governments, or individuals for public display of the archaeological resources recovered. The commission shall require assurances that appropriate security, qualified personnel, insurance, and facilities for preservation, restoration, and display of the resources loaned are provided under the contract.

SEC. 6. Section 6314 is added to the Public Resources Code, to read:

6314. (a) Any person who removes, without authorization from the commission, or any person who destroys or damages an archaeological site or any historic resource, which is located on or in the submerged lands of, and which is the property of, the state, is guilty of a misdemeanor and is punishable by imprisonment in the county jail not to exceed six months or a fine not to exceed five thousand dollars ($5,000), or by both.

(b) In addition, the commission, or, at its request, the Attorney General or a district attorney in whose jurisdiction the violation occurred, may seek civil damages for the damage, loss, or destruction of abandoned shipwrecks, their gear or cargo, or any archaeological site or historic resource located on or in submerged lands of the state. Any vessel used to damage, destroy, or cause the loss of, any such shipwreck or archaeological site of historic resource is subject to a proceeding in rem by the state for the costs and damages resulting from that damage, destruction, or loss. Enforcement may include, where appropriate, a restraining order or injunctive relief to restrain and enjoin violations or threatened violations of Section 6309, Section 6313, or this section and for the return of items taken in violation of these sections.

(c) Any artifact, object, or material which has been removed from a state submerged archaeological site or submerged historic resource, as specified in subdivision (a), and which is found in any watercraft occupied by persons who do not hold a permit as required by Section 6309 or Section 6313 or other reasonable evidence of legal possession is prima facia evidence of violation of that section and the artifact, object, or

material may be confiscated by any state, federal, or local law enforcement officer. Artifacts, objects, or materials confiscated under this section shall be returned to the person claiming ownership, within 30 days of their confiscation, unless a prosecuting attorney determines that they are required as evidence in the prosecution of a criminal violation.

(d) In any case in which a district attorney, at the request of the commission, or with its concurrence, enforces subdivision (a), the commission shall, notwithstanding Section 1463 of the Penal Code, be entitled to an equal division of the fine imposed.

(e) All state and local law enforcement agencies and officers are directed to assist in enforcing this section, and are requested to work with and seek the cooperation of federal law enforcement agencies, including deputizing federal officers when appropriate.

[Remainder of statute omitted in printing]

APPENDIX I

DEFINITION OF "ABANDONED SHIPWRECK" IN SECRETARY OF INTERIOR'S ABANDONED SHIPWRECK ACT GUIDELINES
55 Fed. Reg. 50120–21 (1990)

As used for purposes of these guidelines:

Abandoned shipwreck means any shipwreck to which title voluntarily has been given up by the owner with the intent of never claiming a right or interest in the future and without vesting ownership in any other person. By not taking any action after a wreck incident either to mark and subsequently remove the wrecked vessel and its cargo or to provide legal notice of abandonment to the U.S. Coast Guard and the U.S. Army Corps of Engineers, as is required under provisions in the Rivers and Harbors Act (33 U.S.C. 409), an owner shows intent to give up title. Such shipwrecks ordinarily are treated as being abandoned after the expiration of 30 days from the sinking.

(a) When the owner of a sunken vessel is paid the full value of the vessel (such as receiving payment from an insurance underwriter) the shipwreck is not considered to be abandoned. In such cases, title to the wrecked vessel is passed to the party who paid the owner.

(b) Although a sunken warship or other vessel entitled to sovereign immunity often appears to have been abandoned by the flag nation, regardless of its location, it remains the property of the nation to which it belonged at the time of sinking unless that nation has taken formal action to abandon it or to transfer title to another party. . . .

[Remainder of guideline omitted in printing]